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Law Relating to MARRIAGE & DIVORCE

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Law Relating to

MARRIAGE

&

DIVORCE

[As Amended Upto-date]

By

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THIS BOOK IS DEDICATED TO THE MEMORY OF MY FATHER

Late B. A. PURANIK, B. Sc., LL. B.

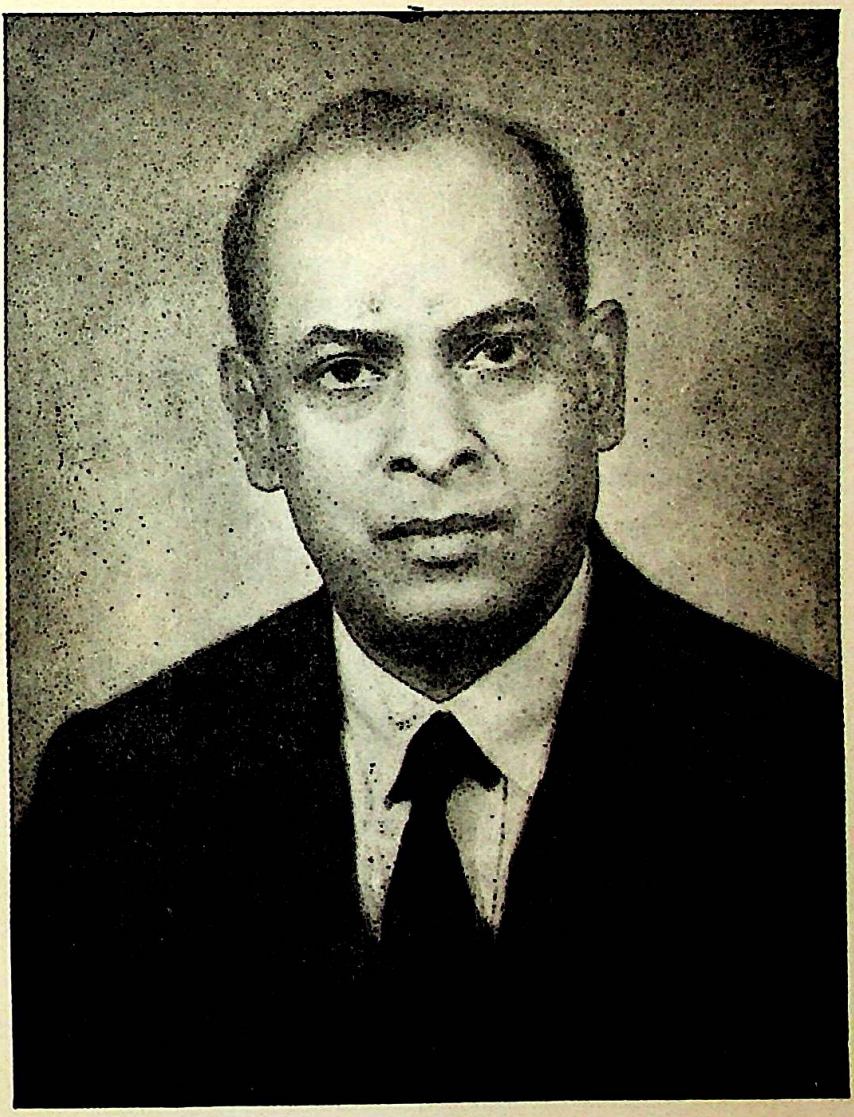
(Retd. C.O.C.) *Advocate*

Author of Bombay Public Trusts Act, 1950 Court Fees Act,
Bombay Shops & Establishments Act, Codified Hindu Law
Guides the Judicial Departmental Examinations.

IN GREATFUL REMEMBRANCE OF THE LEARNING, WISDOM AND TIRELESS LABOUR BE BESTOWED ON IT.

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LATE SHRI B. A. PURANIK
B. Sc., LL. B., Advocate

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PREFACE

The first edition of Codified Hindu Law was published in the year 1958 by my Father, Late B. A. Puranik, B. Sc. LL. B., Advocate Solapur to serve as a guide to law students and lawyers. Since the publication of the First edition, fundamental changes and substantial modifications have been brought about in Hindu Law by a series of enactments, intended to ensure a uniform Civil Code of personal law for Hindu in the whole country. The Special Marriage Act, 1954, being a civil law applicable to all, has necessarily to keep pace with any reform of matrimonial laws. The objects of the legislation are mainly ; (i) to liberalise the provisions relating to divorce ; (2) to enable expeditious disposal of proceedings under the Act ; and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Act. The Marriage Laws (Amendment) Act, 1976 (No. 68 of 1976) came into force on 27th May, 1976. The age of the bridegroom has been increased from 18 years to 21 years, and the age of the bride has been increased from 15 to 18 years by the Child Marriage Restraint (Amendment) Act, 1978 to overcome the consent of the guardian to be obtained for the marriage. It is, however, felt that when once the parties have chosen to move the court for divorce by mutual consent, it is not necessary to make them wait for a further period of one year to obtain relief. The following new grounds for divorce has been added by suitable amendments viz. (1) cruelty, (2) desertion, (3) Schizophrenia, (4) Psychopathic or mental disorder. Cruelty in matrimonial law may be of infinite variety. It can be subtal or brutal, physical or mental, by words, gestures, or mere silence, violence or non-violence.

The present edition is a new topic substituted for the first edition, thoroughly, revised and enlarged under the name "The Law relating to Marriage and Divorce". Marriage and Divorce are the important incidents in the life of a person. The matrimonial offences leading to break down of the marriage, are due to sex disloyalty, disharmony, financial difficulties, incompatibility of temperament, supercilious feelings of self-respect, indignity ; non-performance of marital obligations, non-forbearance lack of prudence, non-suitability of environments and the like. The catalogue of grounds furnished above very often jeopardise the matrimonial ties. The virtues of happy and harmonious matrimonial relations has divine sanctity and pleasure.

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In annotating this edition, I have listed Rules of all the High Courts under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954, together with relevant texts of Dowry Prohibition Act, The Child Marriage Restraint Act, The Dissolution of Muslim Marriage Act, The Parsi Marriage Act, The Christian Marriage Act, relevant extract of Civil Procedure Code and all the laws of the land relating to marriage and divorce by way of appendices. For ready reference I have given model forms of Hindu Marriage Petitions and defences to such petitions, in this edition. I have taken sufficient care in preparing this edition and to make it upto date. Every endeavour has been made to preserve clarity and precision, and case-law upto the end of March, 1984 has been incorporated as far an possible. In order to facilitate references, several equivalent citations are given in the foot-notes and table of cases. However, I shall be glad to know from the readers, the mistakes and omissions in it, so that I may remove them while revising the edition in future.

I take this opportunity of recording my sincere thanks for the valuable assistance and guidance given to me, in completing this book to Shri M. S. Ansari, Advocate, Shri G. N. Rajput, M.A. LL.B., Advocate, Solapur, Shri R. M. Mangire, B.A., LL.B., Shri A. S. Hingmire, B.A. (Hons) LL. B., Shri B. V. Thokde, B.A. LL. B. Shri A. A. Deshpande, B.A., LLB., Shri R.C. Joshi, B.A. (Mons.) LLB. Advocates of Barshi and Shri P. R. Karanjkar, B. Sc. LL.B. Principal Rajashri Shahu Law College, Barshi (Distt. Solapur). Lastly I think it my duty to acknowledge the assistance given to me by Shri Manikrao Kulkarni, typist and the publisher Shri Om Prakash Arora of C.T.J. Publications, Nasik in preparing the book, printing and publishing.

A. B. Puranik

31st May, 1984

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Law relating to
Marriage & Divorce

INTRODUCTION

SYNOPSIS

1. Nature and origin.
2. Distinctive features.
3. Why Hindu Law is applied.
4. Sources of Hindu Law.
5. Commentaries and Digests.
6. Schools of law.
7. Sub-Divisions of Mitakshara School.
8. Difference between the Schools.
9. Custom.
10. Judicial decisions.
11. Legislation.
12. Persons governed by Hindu Law.
13. Migration and Schools of law within India.
14. Migration out of India.
15. Need of legislation.
16. Preamble.

1. Nature and origin.—Hindu Law is a branch of *Dharma*. *Dharma* is defined as "What is followed by those learned in the *Vedas*, and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affections." The rules of *Dharma* should be ascertained from four sources, the *Vedas*, the *Smritis*, the conduct of virtuous, and one's own conscience. According to jurists, Hindu Law is based upon immemorial customs which existed prior to and independent of Brahmanism. Subsequently, Brahmanism modified the ancient customs, by introducing the religious element into legal conceptions ; first, by attributing pious purposes to purely secular acts ; secondly, by adding restrictions to those acts suitable to such pious purposes ; and thirdly, by altering the customs themselves so as to further the special objects of religion or policy favoured by Brahmanism (Mayne).

The Hindu Law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing the Hindus.[1]

2 Distinctive features.—Hindu Law differs from other legal systems of the world in its system of the joint family, the law of adoption and the rules of succession and heritance.

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1. *Mookka Kone v. Ammakutty*, I.L.R. 51 Mad. 1.

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3. **Why Hindu Law is applied.**—Statutes of Parliament and local legislation authorise and regulate the application of Hindu Law to the Hindus. Throughout India questions relating to succession, inheritance, marriage of the Hindus and Hindu religious usages and institutions are to be decided according to Hindu Law. Besides, in other matters such as adoption, guardianship, family relations, wills and partitions, Hindu Law is applied by virtue of express legislation, or on principles of justice, equity and good conscience. It is a branch of personal law excepting in so far as these rules are varied or modified by legislation.

4. **Sources of Hindu Law.**—They are (1) the *Sruti*, (2) *Smritis*, (3) the Commentaries and Digests, (4) Custom, (5) Judicial decisions, (6) Legislation.

The Sruti : *Sruti* (that which was heard) are supposed to be the actual utterances of the Creater.[1] The *Sruti* comprised the four *Vedas*, the six *Vedangas* or appendages to the *Vedas* and the *Upanishads*.

Smritis : They are the codes of Manu, Yadnyavalkya and Narada. The *Vedas* and the *Smritis* constituted the primary sources of Hindu Law, the *Smritis*, in case of a conflict, yielding to the authority of the *Vedas* or *Sruti*.

5. **Commentaries and Digests.**—In the development of Hindu Law after the *Smritis*, it was a composition of a number of commentaries and digests based upon the *Smritis* or *Dharma Shastras* and *Sutras*. The authority of the commentaries varied in the different districts, and thus arose what are called the "Schools of Law".

6. **Schools of Law.**—The remorter sources of the Hindu Law are common to all the different schools. The commentator put his own gloss on the ancient text, and his authority having been accepted in one and rejected in another part of India, schools with conflicting doctrines arose.[2] But it should be remembered that the commentaries are only commentaries ; they do not enact ; they explain and are evidence of the congeries of customs which form the law.[3] The two principal schools of Hindu Law are (1) Mitakshara and (2) Dayabhaga. The Mitakshara is a commentary on the Code of Yadnyavalkya by Vijnaneshwara, who flourished the latter part of the 11th century. The Dayabhaga purports to be a digest of all the Codes written by Jimutavahan, who lived somewhere between the 13th and the 15th centuries. The Dayabhaga is a supreme authority in Bengal.

7. **Sub-Divisions of Mitakshara School.**– Various treatises and commentaries were written on Mitakshara. The difference in their interpretation has given rise to sub-schools, though all the sub-schools acknowledge the supreme authority of Mitakshara. These sub-schools and the works which supplement the Mitakshara in each are : –

(1) The Banaras School : Virmitrodaya, Nirnayasindhu.

(2) The Mithila School : Vivadachintamani, Vivada Ratnakar.

(3) The Dravida or Madras School : Smriti Chandrika, Parasara Madhava, and Virmitrodaya.

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1. *Shri Balasu* v. *Shri Balusu*, ILR 22 Mad 398.
2. *Collector of Madura* v. *Mootoo Ramlinga*, 12 MIA 435.
3. *Jawahir Lal* v. *Jaran Lal*, ILR 46 All 192.

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(4) The Bombay or Maharashtra School : Vyavahara Mayukh, Virmitrodaya and Nirnayasindhu.

It should be noted that geographical limits of these schools cannot be accurately defined.

8. **Difference between the schools.**—The Mitakshara and Dayabhaga systems differ in two main particulars : (1) in some matters connected with the joint family system and (2) in the rules of inheritance. Under the Mitakshara system rights in the family property are acquired by birth. In the matter of inheritance, the Mitakshara system founds the right of inheritance on the principle of *nearness of blood* and prefers agnates to cognates, generally. The Bengal School bases the right to inherit upon the principle of *the amount of spiritual benefit* which the person claiming can confer by an offering to the manes of the deceased. The sub-divisions of the Mitakshara Schools differ between themselves and from the Bengal Schools in some questions of adoption, stridhan and inheritance. The Bombay School differs from all the other schools in certain respects. It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis introduced changes in order to bring it into harmony with the usage followed by the people governed by the law ;... It is, therefore, clear that in the event of a conflict between the ancient text writers and commentators, the opinion of the latter must be accepted.[1]

9 **Custom.**—Custom is an independent source of law and when it is universally adopted, it should supersede the provisions of the written law.[2] Custom is a rule which in a particular family or a particular district has from long usage obtained the force of law. It is essential that they should be *ancient and invariable* and *established to be so by clear and unambiguous evidence.*[3]

It is well settled that custom may be proved by (1) oral evidence of witnesses acquainted with the custom, (2) instances, and (3) judicial pronouncements, etc. It was held in *Effuah Amissah* v. *Effuah Kraban*[4] that "Material custom must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them".

It was again held in *Tara Singh* v. *Suraj Kaur*[5] that when a custom or usage is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

Custom is always in a fluid state and it changes from time to time. The consistent view of the Judges had been that the right of representation is a recognised right and that sex is no bar to the same.[6]

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1. Per Sir Shadi Lal, J. in *Atmaram* v. *Bajirao*, (1935) 37 Bom LR 553 (PC).
2. *Collector v. Moottoo Ramlinga*, 12 MIA 435.
3. *Hurpurshad* v. *Sheo*, 3 IA 259 ; *Ramalakshmi* v *Shivanatha*, 14 MIA 570 ; *See* also *Hirabharathi* v *Bai Juver*, 30 Bom LR 1555, 1558 ; *Mookka* v. *Ammakutti*, ILR 51 Mad 1.
4. 162 Ind Cas 461 : AIR 1936 PC 147.
5. ILR (1941) Lah 546 : AIR 1940 Lah 416.
6. *Ram Rakha and others* v. *Smt. Ram Rakhi*, AIR 1983 HP 18 at p. 23 ; 1982 Sim LC 255 (FB).

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10. Judicial decisions.—The decisions have played a considerable part in ascertaining, and sometimes, in developing and crystallising Hindu Law, and in this sense judicial decisions may be said to be a source of Hindu Law.

11. Legislation.—The important Acts of the Indian Legislature that have modified or supplemented Hidu Law are the following :—

(1) The Caste Disabilities Romoval Act, 1850.

(2) The Hindu Widows' Remarriage Act, 1856.

(3) The Indian Penal Code, 1860.

(4) The Native Converts' Marriage Dissolution Act, 1866.

(5) The Indian Contract Act, 1872.

(6) The Indian Evidence Act, 1872.

(7) The Indian Majority Act, 1875.

(8) The Transfer of Property Act, 1882.

(9) The Indian Succession Act, 1925.

(10) The Hindu Disabilities Removal Act, 1928.

(11) The Hindu Law of Inheritance (Amendment) Act, 1929.

(12) The Hindu Gains of Learning Act, 1930.

(13) The Hindu Women's Rights to Property Act, 1937.

(14) The Special Marriage (Amendment) Act, 1954.

(The Acts of 1872 and 1923 have been amended and substituted by the Act of 1954).

(15) (a) The Hindu Marriage Disabilities Removal Act, 1946.

(b) The Hindu Marriage Validity Act, 1949.

(c) The Bombay Prevention of Hindu Bigamous Marriages Act 1946.

(d) The Bombay Hindu Divorce Act, 1947.

(e) The Madras Hindu (Bigamy Prevention and Divorce) Act 1949.

(f) The Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950, and

(g) The Saurashtra Hindu Divorce Act, 1952.

These Acts have been repealed by Section 30 of the Hindu Marriage Act, 1955.

(h) Hindu Marriage Act, 1955 and (Amendment) Act of 1956.

(16) The Hindu Succession Act, 1956.

The Hindu Law of Inheritance (Amendment) Act, 1929, and The Hindu Women's Rights to Property Act, 1937, have been repealed by Section 31 of the Hindu Succession Act.

(17) The Hindu Minority and Guardianship Act, 1956.

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(18) The Hindu Adoptions and Maintenance Act, 1956.

The Hindu Married Women's right to Separate Residence and Maintenance Act, 1946, and Section 30 (2) of the Hindu Succession Act, 1956, have been repealed by Section 29 of the Hindu Adoptions and Maintenance Act, 1956.

12. Persons governed by Hindu Law.—The question as to who are governed by Hindu Law gives rise to the question as to who are the Hindus. The term 'Hindu' is not very definite in its significance. Etymologically, it applies to an inhabitant of India and has a territorial significance. The term 'Hindu' in the Indian Succession Act is used in a theological as distinguished from a national or racial sense, and that any person of a non-Hindu origin can become a Hindu by conversion.[1] The Courts are required to apply the Hindu Law in cases where the parties are Hindus in deciding any question regarding succession, inheritance, marriage, maintenance, or adoption or any religious usage or institution. Questions relating to minority and guardianship, family relations, wills, deeds and partitions are also governed by Hindu Law though they are expressly mentioned in some of the Acts and not in the others. Liabilities for debts and alienations though they are not mentioned in the Acts are connected with those topics and are equally governed by Hindu Law.

13. Migration and Schools of Law—Within India.—Where Hindu family migrates from one part of India to another, *prima facie*, they carry with them their personal law.[2] Where a Hindu family migrates from the N. W. Provinces, where the Mitakshara Law prevails, to Bengal, where the Dayabhaga Law prevails, the presumption is that the family continues to be governed by Mitakshara Law.[3]

14. Migration out of India.—Hindu Law being a personal law is not affected by a change of domicile. It is the law in force in the province at the time of their leaving it which continues to govern the persons who have migrated to another province.[4]

15. Need of legislation.—The need of reforms of Hindu Law has been felt since a very long time and it is so far codified by the following Acts of the Parliament :—

(1) The Hindu Marriage Act, No. 25 of 1955.
The Hindu Marriage (Amendment) Act, No. 73 of 1956.

(2) The Hindu Succession Act, No. 30 of 1956.

(3) The Hindu Minority and Guardianship Act, No. 32 of 1956.

(4) The Hindu Adoptions and Maintenance Act, No. 78 of 1956.

The outstanding features are that a man and woman have been treated on the basis of equality in the matter of succession and adoption. The woman under the Hindu Succession Act, 1956, not only takes the property absolutely,

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1. *Ratansi* v. *Administrator General of Madras*, 52 Mad 160 ; *Kamvati* v. *Digbijai*, ILR 49 All 526 (PC).
2. *Abulrahim* v. *Halimabai*, 43 IA 35.
3. *Parbati* v. *Jagadis*, 29 IA 82 ; See also *Sonabai* v. *Lakshmibai*, AIR 1957 Nag 79 (DB).
4. *Balwantrao* v. *Bajirao*, 47 IA 213.

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as much as the man takes, but she inherits the property along with the man, and whenever she inherits the property simultaneously with male heir she takes an equal share. In a word, now persons with whom the deceased has greater ties of love and affection share the property, irrespective of the fact whether they are male or female. Along with the Hindu Marriage Act, the Hindu Succession Act certainly goes to improve the position of the Hindu woman very much. The Hindu Succession Act confers the testamentary power on the Hindu. Even a coparcener of Mitakshara family can dispose of his share by will. However, the Act continues to retain the Mitakshara coparcenery with its necessary concomitant, the devolution of property by survivorship. Though the effects of that system have been considerably, mitigated, yet the fact remains that the Mitakshara coparcenery continues to be part and parcel of the Hindu Law. In this short book the various topics dealt with are mostly confined to the important provisions of the above four Acts.

16. **Preamble.** – The preamble to each of the above four Acts of the Parliament begins with the words "An Act to amend and codify the law relating to..." Article 44 of the Constitution of India lays down "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

Literal meaning of the word 'code' is systamatic collection of statutes, body of laws so arranged as to avoid inconsistency and overlapping. It will, therefore, appear that the words used in the preamble of the Acts are in accordance with the directive principle laid down by the Constitution of India.

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THE HINDU MARRIAGE ACT, 1955

(ACT No. 25 of 1955)

[18th May, 1955]

[*Received the assent of the President on the 18th May, 1955*]

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows :

SYNOPSIS

1. History of legislation.
2. Nature of marriage according to Hindu Law under this Act.
3. Note on preamble.
4. Statements of Objects and Reasons—Statements of Objects and Reasons used for limited purpose.
5. Object of the Act.
6. Interpretation of statements—Marginal notes.

1. History of Legislation.—The Hindu Law Committee suggested codification of whole Hindu Law. They reported "We then state our opinion that the only satisfactory solutions to avoid peace-meal legislation and to take up as early as possible the codification of Hindu Law beginning with the law of succession followed by the law of marriage.

"36. The recommendation which we should like to stress most strongly is that relating to the preparation, in gradual stages, of a complete code of Hindu Law."[1] It appears that during the course of drafting and redrafting, the Hindu Law Committee changed its suggestion perhaps due to difficulty of codifying the whole of the Hindu Law and hence in the proposed Bill only certain branches of Hindu Law had been dealt with.[2]

2. Nature of marriage according to Hindu Law and under this Act.— A Hindu marriage is primarily considered a holy union for the performance of religious duty. It is a sacrament and not a contract. It is a tie which once tied, can never be untied though it may be broken by the death of either of the spouses. Thus dissolution of a Hindu marriage is not possible ; even the death of the husband, under the pure Hindu Law, will not free her from the sacramental bond.[3] The Hindu marriage is a sacrament in the sense that a wife can never ask for divorce or for another husband, let her husband be a lunatic, an impotent, a lepor, or a deserter.[4] These were the realities of the age. Since our social circumstances, social needs and social facts have changed yet

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1. Report, page 23, paras 35 and 36.

2. See the preamble to the Bill and to L. A. Bill No. XXVI of 1942 relating to succession.

3. See Mayne Hindu Law.

4. *Mauji Lal* v. *Chandrawati*, ILR 38 Cal 700 ; *Amrithamal* v. *Veallimagal Ammal*, AIR 1942 Mad 693 ; *Bhagawati Singh* v. *Parameswari Nandan Singh*, ILR (1942) All 515.

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the old notions, old rules and old institutions have continued to linger on and we are forced to feel that something should be done. The Hindu Marriage Act has done what is necessary. It lays down (a) Monogamy shall be a rule of law for all Hindus and (b) the divorce shall be available for all Hindus. The Act lays down as a condition precedent of the marriage that neither party to the marriage shall have a spouse living at the time of the marriage. If a person takes another spouse in the life time of a former spouse the second marriage shall be null and void.

3. **Note on preamble.**—It is "a key to open the minds of the makers of the Act, and the mischief it was intended to redress."[1]

4. **Statements of Objects and Reasons.**—"The Hindu Code as drafted by the Rau Committee was introduced in the Legislative Assembly in 1947 and was referred to a Select Committee of the Constituent Assembly of India (Legislative) on the 9th April, 1948. The Select Committee submitted its report on the 29th August, 1948 and their revised draft was discussed at considerable length by the Provisional Parliament, but as the Bill could not be passed before the dissolution of that Parliament it now stands lapsed.

As stated earlier by Government the Code is now being split up into separate parts for the purpose of facilitating discussion and passage in Parliament, and the present Bill is the first of a series of such parts and deals with marriage and divorce. The earlier Bill has now been considerably revised, one significant charge being the omission of all provisions relating to civil marriages, a subject dealt with in the Special Marriage Bill now pending before the Council of States. The notes on clauses explain the various provisions contained in the Bill".[2]

Statements of Objects and Reasons—Used for limited purpose.—It has been said that although the statement of objects and reasons appended to a bill is not admissible as an aid to the construction of the Act as passed, yet it may be referred to only for the limited purpose of ascertaining conditions prevailing at the time which necessitated the making of the law.[3]

5. **Object of the Act—Duty to give effect to.**—Courts always lean towards a construction which would help in giving effect to the object underlying a statute.[4]

In construing a section or a proviso, Court must take into consideration the object of the Act and even in certain cases the circumstances which led to the passing of a particular legislation.[5]

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1. *Income Tax* v. *Pemsel*, (1891) 1 AC 531, 542.
2. New Delhi, 8th December, 1952, C. C. Biswas. Bill No. VII of 1952.
3. *A. Thangal Kunju* v. *M. Venkatachalam*, (1955) 2 SCR 1196 : 1956 SCJ 323 : (1956) 29 ITR 349 : 1956 SCA 259 : AIR 1965 SC 246.
4. *State* v. *Bhaishankar Uttamrai*, 58 Bom LR 435 : ILR (1956) Bom 511 : AIR 1956 Bom 660 (DB).
5. *Bapubhai* v. *State of Bombay*, AIR 1956 Bom 21 : ILR (1955) Bom 870 : 57 Bom LR 892 (DB) ; See also *Rajaraja Varman* v. *K. K. Krishnan Nair*, 69 Mad LW 401 : (1956) 2 Mad LJ 46 ; *Palanichami Chettiar* v. *Reliance Bank of India Ltd.*, (1956) 2 Mad LJ 1 : 69 Mad LW 440 ; *Ranganathan* v. *Govt. of Madras*, 1955 SCA 841 ; *Aswini Kumar Ghosh* v. *Arbinde*, AIR 1952 SC 369.

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6. Interpretation of statutes—Marginal note.—Where it was contended that grant of higher sum was warranted and that the term "support" takes in not only the amount required for maintaining the wife and child, but also something more than mere maintenance. In particular the contention was that the marginal note which describes the amount granted under Section 24 to be "maintenance *pendente lite*", cannot be taken into account in construing the word "support". Of course, marginal note cannot govern the express provision of the Act, but where the words of the Act are susceptible of more than one meaning or are ambiguous, the marginal note can be certainly taken into account provided the marginal note was part of the Bill which was presented to the Parliament for its consideration and was passed into an Act.[1] Even without the help of the marginal note, the amount that may be granted even by way of support cannot determined solely with reference to the number of persons that have to be maintained from out of the income available.[2]

Preliminary

1. Short title and extent.—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

SYNOPSIS

1. General.
2. Commencement and extent.
3. Domicile.

1. General.—Since the passing of the Hindu Marriage Act, various suggestions for amending the same as well as the Special Marriage Act, 1954 were received from some members of Parliament and the general public. The Special Marriage Act, 1954, being a civil law applicable to all, has necessarily to keep peace with any reform of matrimonial laws. The law commission was requested to examine the matter and they have presented the Fifty-ninth Report which contains their recommendations. The religious character of the institution has been blurred in the modern notions of matrimony based upon the western culture and social outlook.

The Marriage Laws (Amendment) Act, 1976 (Central Act LXVIII of 1976) has ushered in great changes in the grounds for divorce and judicial separation under the Hindu Marriage Act. It has also provided for divorce by mutual consent throwing into focus the fragile character of the Hindu matrimonial tie at the present time. The amendments to the parent Act made by the Act of 1976 coupled with the provisions in the Child Marriage Restraint (Amendment) Act, 1978 (Central Act II of 1978) raising the minimum age limits of the parties to a Hindu Marriage, from 15 years to 18 years for females and from 18 years to 21 years for males have imparted emphasis to the consensual element in modern Hindu Marriages. To avoid multiplicity of litigation and consequent delay, it is also proposed to apply the Amended law in relation to all

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1. *Vide* Craies on Statute Law, page 196 (7th Ed.).
2. *Narendra Kumar Mehta* v. *Smt. Suraj Mehta*, AIR 1982 AP 100 at p. 107.

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pending proceedings under the relevant Act. The objects of the legislation are mainly, (1) to liberalise the provisions relating to divorce; (2) to enable expeditious disposal of proceedings under the Act; and (3) to remove certain anomalies and handicaps that have come to light after the passing of the Acts.[1]

The Hindu Marriage Act introducing as it does the principle of monogamy is a law providing for social welfare and reform as contemplated by Article 25 (2) of the Constitution.[2] The Act and its provisions have been held as not contravening the fundamental Articles 14 and 15 of the Constitution of India.[3]

2. Commencement and extent.—The Act received the assent of the President on 18th May, 1955 and came into operation on that day. It extends to the whole of India and applies to all Hindus domiciled in India. It has now been, by appropriate legislation, applied to also Jammu and Kashmir. The general principle of private international law is that the *lex loci* governs matters relating to immoveable property and the law of domicile governs personal relations. Some of the principles which determine domicile were considered by the Supreme Court.[4]

3. Domicile.—The word 'domicile' has not been defined in the Act. It is different from citizenship of India which has been laid down in Article 5 of the Constitution. Domicile denotes the relation between a person and a particular territorial unit possessing its own system of law. It is different from nationality or citizenship. It determines his personal status and the law applicable to him in matters such as majority or minority marriage, divorce and succession. The law recognises separate domicile of each territory or part of a State, which has a uniform system of law.[5] The Bombay High Court has held in *M. A. Rodrigues* v. *Bombay State*,[6] as follows :

> "A person can acquire a domicile of choice by a conscious act. He must not only give up the country of his origin, but he must make up his mind to stay for an indefinite period in the country where he wants to acquire the domicile of choice. Therefore where a person wishes to establish that his domicile of choice is India, he must establish the fact of residence in India and he must also establish the animus of intending to reside permanently or for a limited time in India. What the Court in such a case has to consider is not residence by itself but the quality and character of that residence. It is not enough for the applicability of the Act if one of the parties alone has an Indian domicile.[7] The question of domicile may assume importance only when the marriage between the parties is prohibited by the domestic rule or law of the land to which one of the parties, a foreigner may belong.[8] The domicile of choice is dependent on (a) residence and (b) intention of the person who resides. It is a question of fact in which intention plays

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1. See *Cidhayi* v. *Narayanaswami*, (1978) 1 MLJ 49.
2. *G. Sambi Reddy* v. *G. Jayamma*, AIR 1972 AP 156 (FB).
3. *Haisman* v. *Ningal*, AIR 1959 Manipur 20.
4. See *Central Bank of India Ltd.* v. *Ram Narayan*, (1955) ASC 36.
5. *Radhabai Mohandas* v. *State of Bombay*, 57 Bom LR 827.
6. *M. A. Rodrigues* v. *Bombay State*, 58 Bom LR (OGJ) 825.
7. See *Gour Gopal Roy* v. *Sipra Roy*, AIR 1978 Cal. 163 (FB).
8. *Prem Singh* v. *Dularibai*, 77 Cal WN 535.

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a vital role.[1] The Act applies only to the marriages between spouses both of whom are Hindus. If one of them is a Hindu, the Act has application.[2] The Act is a codifying Act, the object of codification of a particular branch of law is that on any matter specifically dealt with by it, the law should be sought for in the codifying enactment itself.[3]

2. Application of the Act.—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj ;

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion ; and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be :

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion ;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Art. 366 of the Constitution unless the Central Government by notification in the official Gazette, otherwise directs. . . . . .

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1. *Gour Gopal Roy* v. *Smt. Sipra Roy*, AIR 1978 Cal 163 (FB).
2. See *Premila Khosla* v. *Rajnish Khosla*, AIR 1978 Del. 78.
3. *Govindrao Musale* v. *Anandirao Musale*, 1977 Mh. LJ 144 : AIR 1976 Bom 433 : 79 Bom LR 73.

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(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

SYNOPSIS

1. Application of the Act.
2. Brought up as a member, etc.
3. Hindu need not belong to Hindu religion.

1. Application of the Act.—Section 2 of the Hindu Marriage Act, Section 2 of the Hindu Succession Act, Section 3 of the Hindu Minority and Guardianship Act, 1956 and Section 2 of the Hindu Adoptions and Maintenance Act, 1956 are similarly worded. The word 'Hindu' does not denote any particular religion or community. During the last 100 years and more it has been a nomenclature used to refer comprehensively to various categories of people for purposes of personal law. Hindu law applies (i) to Hindus by birth and to Hindus by religion, that is to say, to converts and re-converts to Hinduism (ii) to legitimate children where the mother is a Hindu and the children are brought up as Hindus (iii) to illegitimate children where both parents are Hindus (iv) to Brahmos, Arya Samajists, Lingayats and to persons who may have deviated from other dox standards of Hinduism in matters of diet and ceremonial observance and to every other person who may be regarded as Hindu unless he can show some valid local tribal or family custom to the contrary and (v) to Jains, Sikhs and Buddhists. This section in effect seeks to codify the existing law on the question.

The Hindu religion is marvellously catholic and elastic. Its theology is marked by electicism and tolerance and almost unlimited freedom of private worship. Its social code is much stringent, but amongst its different castes and sections it exhibits wide diversity of practice.[1] The Act is applicable to Jains.[2] It also applies to converts to Hinduism.[3] Hindu undivided family includes Jain undivided family.[4] The Act includes persons converted to Buddhism.[5]

2. Brought up as a member, etc.—The requirement under Explanation (b) to Section 2 (1) that the child have been brought up as a Hindu, etc. is inbuilt in the Explanation itself. For invoking the explanation it is necessary to establish that the child in question has been brought up as a Hindu before he can be said to be Hindu.[6] If a son of a parent belonging to a regenerate class inducts the child into the Hindu family and brings him up as such, then the statute

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1. *Bhagwan Koer* v. *Bose*, (1904) 31 Cal 11, 15.
2. *Commr. of W. T.* v. *Smt. Champa*, AIR 1968 Cal 74.
3. ILR (1966) 2 Mad 373 : 80 Mad LW 15.
4. *Commr. of W. T.* v. *Smt. Champa*, AIR 1972 SC 2119.
5. *Smt. Baby* v. *Jayant and others*, AIR 1981 Bom 283.
6. *Commr. of Income-Tax, Madras* v. *Venkataraman*, (1977) 109 ITR 247 ; 1977 Tax. LR 1105.

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invests him with the status of a Hindu and recognises him as a Hindu.[1] The Act applies also to converts to Hinduism.[2]

3. Hindu need not belong to Hindu religion.– Sub-section (3) of this Act makes it perfectly clear that to be governed by this Act one need not belong to or profess the Hindu religion. He may be an atheist, he may be an agnostic, and he may even be one who shows open hostility to the tenets of Hindu faith. But still he can be governed by this Act if he does not belong to the Islamic, Christian, Parsi or Jewish religion.

The Scheduled tribes are not governed by this Act unless the Central Government by notification in the Official Gazette otherwise directs.

3. Definitions.—In this Act, unless the context otherwise requires,—

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy ; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family ;

(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the official Gazette, as having jurisdiction in respect of the matters dealt with in this Act ;

(*c*) "full-blood" and "half-blood"—two persons are said to be related to each other by full-blood when they are descended from a common ancestor by the same wife and by half-blood when they are descended from a common ancestor but by different wives ;

(*d*) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands ;

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1. *Sridharan* v. *Commr. of W. T.*, (1970) 2 MLJ 334 : 1970 Mad 249.
2. *Seethalakshmi Ammal* v. *Ponnuswami Nadar*, ILR (1967) 2 Mad 273 : 80 LW 15 : (1967) 2 MLJ 334.

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Explanation.—In clauses (*c*) and (*d*), "ancestor" includes the father and "ancestress" the mother ;

(*e*) "prescribed" means prescribed by rules made under this Act ;

(*f*) (*i*) "*sapinda* relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation ;

(*ii*) two persons are said to be "*sapindas*" of each other, if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them ;

(*g*) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(*i*) if one is a lineal ascendant of the other ; or

(*ii*) if one was the wife or husband of a lineal ascendant or descendant of the other ; or

(*iii*) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other ; or

(*iv*) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters ;

Explanation.—For the purposes of clauses (*f*) and (*g*), relationship includes—

(*i*) relationship by half or uterine blood as well as by full-blood ;

(*ii*) illegitimate blood relationship as well as legitimate ;

(*iii*) relationship by adoption as well as by blood ;

and all terms of relationship in those clauses shall be construed accordingly.

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SYNOPSIS

1. Definitions.
2. Hindu Law—Custom.
3. District Court.
4. Prescribed.
5. Sapinda relationship.
6. Prohibited relationship.

1. Definitions.—(1) The expressions "Custom" and "Usage".

Section 3 (a) of the Hindu Marriage Act, 1956.

Section 3 (a) of the Hindu Adoptions and Maintenance Act, 1956, and

Section 3 (d) of Hindu Succession Act, 1956, and

(2, "Full blood", "Half blood" and "Uterine blood".

Clauses (c) and (d) of Section 3 of Hindu Marriage Act, 1955, and clause (c) of Section 3 of Hindu Succession Act, 1956 are similarly worded.

2. Hindu Law—Custom. – A custom which is abhorrent to decency or morality, however long practised and recognised by a particular community, can find no kind of enforcement by a Court of law.[1] Going through certain ceremonies with the intention that the parties be taken to be married will not make them ceremonies prescribed by law or approved by custom.[2] The customary form of marriage amongst members from Buddhist Community converted from Scheduled Castes sometimes in 1956, is a valid marriage, though Section 2 of Hindu Marriage Act includes persons converted to Buddhism.[3] The parties Hindus at the time of marriage but marrying according to Buddhist rites Fact that such marriages are taking place for the last 10 to 15 years is not enough to establish custom Marriage not valid.[4] Each case of custom or usage must rest upon its own peculiar nature and facts and no hard and fast rule can be laid down. The custom not requiring saptapadi must be proved to supercede Shastra – Custom must be continuous and uniformly observed for a long period and should have obtained force of law.[5]

3. District Court. District Court has been defined to mean the City Civil Court where there is one, or the principle Court of original jurisdiction in other areas or any Court notified by the State Government to have jurisdiction under the Act. Courts other than the principle Court of original jurisdiction, which, by notification under Section 3 (b) are conferred with jurisdiction to entertain proceedings under the Act, are not District Courts proper and irrespective of valuation an appeal would not lie against the decrees of such Courts to the High Court.[6] The expression "District Court" does not imply the District Judge alone it also includes the Additional District Judge also. The petition transferred to Additional District Judge by the District Judge has

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1. *Balusami Reddiar* v. *Balakrishna Reddiar*, ILR (1957) Mad 164.
2. *Bhaurao* v. *State of Maharashtra*, AIR 1965 SC 1564.
3. *Smt. Baby* v. *Jayant and others*, AIR 1981 Bom 283.
4. *Shakuntala* v. *Nilkanth*, 1973 Mh LJ 310.
5. 1969 Cr LJ 836 AP).
6. See *Nrisingh Chavan* v. *Hemanth Kumar*, AIR 1978 Orissa 163.

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power to dispose of the matter.[1] The District Court being a Court of exclusive jurisdiction for only matters falling within the Act, cannot grant relief other than those provided in the Act.[2] The decree for restitution of conjugal rights was appealed to the High Court instead of before District Judge and no objection was raised to its jurisdiction. The decree rendered in appeal cannot be held to be a nullity.[3] The admitted relationship between two spouses is not a jurisdictional fact and where in the petition by wife for restitution of conjugal rights the husband denies the relationship, the Court has jurisdiction to entertain the application.[4] Where there is no Notification under Section 3 (b) of the Act specifying any other Civil Court as a District Court for the purposes of the Act and the petition under the Act for restitution of conjugal rights is decided by the Additional District Judge the appeal will lie to the High Court and not to District Court.[5] So also the decree passed by the Civil Judge Senior Division may be appealed to the District Court and not the High Court.[6]

The District Judge can transfer the proceedings under this Act to the Additional District Judge.[7] The District Court acts as a Court and not as *persona designata*.[8] The Judge, Small Cause Court who enjoys special powers by virtue of Section 3 (b) can entertain divorce petition even if Item 37 of Schedule II of Provincial Small Cause Courts Act (1887) ousts his jurisdiction in such a matter.[9] In Manipur territory expression "District Court" in Section 3 (b) includes a Court of Additional District Judge.[10] The District Court has no jurisdiction to entertain and try petition by wife praying for an injunction against her husband not to take second wife.[11] The order passed by the Subordinate Judge 1st Class empowered under Section 3 (b) is appealable to High Court and not District Court.[12]

A decree passed by the Court of Small Causes, acts as 'District Court' and hence appeal and not revision against the decision is maintainable.[13] Application for maintenance is recourse to Civil Court.[14]

4. Prescribed—means prescribed by the rules made under this Act.[15]

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1. *Rajamma* v. *Krishnamma Naidu*, (1964) 1 Andh WR 287 ; AIR 1964 AP 460 ; *Ajit Kumar* v. *Kannon Bala*, AIR 1960 Cal 565.
2. *Umashankar* v. *Radha Devi*, AIR 1967 Pat 220.
3. *Rabindranath* v. *Smt. Pramila Bala*, AIR 1979 Orissa 85 (DB) : 47 Cut LT 182.
4. *Sridhar* v. *Jayashri*, 1965 Mh LJ Note 56.
5. *Ambi* v. *Pundalik*, 1960 NLJ Note 32 : AIR 1960 Cal 565 (1) (DB).
6. AIR 1960 Bom 42 (DB).
7. AIR 1956 SC 391 ; AIR 1962 J & K 42 (DB) ; AIR 1966 MP 167-68 (DB).
8. AIR 1972 Raj 200.
9. *Girwar Singh* v. *Smt. Premawati*, AIR 1972 All 474.
10. AIR 1969 Manipur 93.
11. *Umashankar Pd.* v. *Smt. Radha Devi*, AIR 1967 Pat. 220.
12. AIR 1961 Punj 480 (DB).
13. *Chandra Swarup Sinha* v. *Smt. Manorama Sinha*, AIR 1981 All 230 (DB) ; *Shesh Narain* v. *Smt. Savitri*, AIR 1967 All 156 overruled.
14. *Narasingh Charan Nayak* v. *Smt. Hemant Kumari*, AIR 1978 Ori 163.
15. See Sections 8, 14 and 21.

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5. Sapinda relationship.—Sapinda relationship defined in sub-section (f) is in several respects different from the Sapinda relationship prescribed by the Hindu Sastras as prohibited relationship for marriage. While the Hindu Law texts prescribe 7 degrees through the father and 5 degrees through the mother, this Act prescribes 5 degrees and 3 degrees respectively. The common ancestor should be found first and, it should be seen whether the relationship should be traced to him through the father or the mother of the boy or girl to be married.

6. Prohibited relationship.—Sub-section (g) of this section defines prohibited relationship for marriage as that of a lineal ascendant or the wife of such ascendant or the descendant of the boy or the lineal ascendant or the husband of such ascendant or descendant of the girl, the wife of the brother, father's brother, mother's brother, grandfather's or grandmother's brother, etc. For instance the marriage of a Hindu male with his sister's daughter is very frequent even amongst the high Hindus in southern India.

4. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

COMMENTS

This section is similarly worded as Section 4 (1) of the Hindu Succession Act, 1956 and Section 4 of the Hindu Adoptions and Maintenance Act, 1956 and Section 5 of the Hindu Minority and Guardianship Act, 1956. The Act supersedes all existing laws, statutory and customary. However, this is subject to the express saving provisions contained in the Act.[1] Unless in any other enactment there is a provision which abrogates any provision of the Act either expressly or by necessary implications the provisions of the Act alone will be applicable to matters dealt with or covered by the same.[2] Pendency of petition for dissolution marriage under Section 5 of Nair Act on the date of repeal ; right to obtain dissolution under Nair Act continues to be operative.[3] The Hindu Marriage Act contains remedy for the prevention of an act of bigamy by an application or petition permitted by it for that purpose. A suit is therefore not barred impliedly by Section 4 (a).[4]

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1. *Madhavan Nair* v. *Radhamony*, 1979 Ker LT 61.
2. *Rohini Kumari* v. *Narendra Singh*, AIR 1972 SC 459.
3. *Gopala Krishnan Nair* v. *R. Saramma*, AIR 1980 Ker 109 (DB); *G. Madhavan Nair* v. *S. Radhamony*, AIR 1979 Ker 152 overruled.
4. *Shankarappa* v. *Basamma*, AIR 1964 Mys 247.

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After the enactment of the Act, the only Court which has jurisdiction in respect of restitution of conjugal rights is the District Court.[1] Only an application and not suit is maintainable for restitution of conjugal rights.[2] The Act has not been held *ultra vires* on the ground that it imposes monogamy on Hindus where such imposition is not there for the Mohamedan community.[3]

The provisions regarding dissolution of marriage contained Madras Aliyasanthana Act, which is a special enactment are not affected by the 1955 Act and that right exists and continues to be available to the parties governed by that Act.[4] The Act is not retrospective in its operation.

Hindu Marriages

5. Conditions for a Hindu marriage.—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely,—

(i) neither party has a spouse living at the time of the marriage ;

[5][(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent, to it in consequence of unsoundness of mind ; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children ; or

(c) has been subject to recurrent attacks of insanity or epilepsy.

(iii) the bridegroom has completed the age of [6][twenty one years] and the bride the age of [6][eighteen years] at the time of marriage ;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two ;

1. *Kharwan Bai* v. *Lila Ram*, AIR 1963 Punj 118.
2. *Bachhu Bai* v. *Durga Prashad*, AIR 1959 MP 410.
3. *Haisnan* v. *Ningal*, AIR 1959 Manipur 20 ; *See* also *G. Sambi Reddy* v. *G. Jayamma*, 1972 AP 156 (FB) ; *Cf. Mohan Ram* v. *Badamo Devi*, 1974 Cr LJ 227.
4. *Smt. Prema* v. *M. Ananda Shetty*, AIR 1973 Mys 69 (DB).
5. Cl. (ii) substituted by the Marriage Laws (Amendment) Act, 1976.
6. Substituted for the words [Eighteen years] and [Fifteen years] by Act No. 2 of 1978 *vide* Section 6 and Schedule.

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(v) the parties are not Sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two ;

(vi) [1][* * *].

SYNOPSIS

1. Constitution of India—Article 25.
2. Nature of Hindu Marriage.
3. Form of Hindu marriage.
4. Inter-caste marriages.
5. Clause (i) : No spouse must be living—Monogamy.
6. Section 5, Cl. (i) and Section 125, Cr. P. C. 1973.
7. Section 5, Cl. (i) and Section 108, Evidence Act.
8. Sections 5, 17, read with Section 494, I. P. C. and Evidence Act Section 32 (5) and Section 50, Proviso.
9. Clause (ii)—Unsoundness of mind.
10. Clause (iii)—Age of parties to be married.
11. Degree of prohibited relationship—Cl. (iv).
12. Sapinda relationship—Cl. (v).

1. Constitution of India—Article 25.—Sections 5, 9, 10 and 13 and other provisions of Hindu Marriage Act are protected under Article 25 of the Constitution.[2]

2. Nature of Hindu Marriage.– The view of Vyavastha Chandrika is "Marriage among us Hindus though essentially a sacramental.....partakes also in the nature of contract." Though the Act lays down that the customary formalities and ceremonies for the solemnization of the marriage are necessary, it emphasises the contract aspect of the marriage in the sense that it provides for the dissolution of the marriage in certain circumstances. Any irregularity in the performance of rites or ceremonies would not invalidate the marriage.

3. Forms of Hindu Marriage.—Originally Hindu Law recognised as many as eight forms of marriage (1) Brahma, (2) Daiva, (3) Arsha, (4) Prajapatya, (5) Gandharva, (6) Asur, (7) Rakshasa, and (8) Paisacha. Out of them at present only Brahma, Asur and Gandharva are recognised. Brahma form is the best form of Hindu marriage. Besides the above eight forms, there are other forms of marriage valid by custom and by statutes.[3]

1. Anand and Chadar Andazi known in the Punjab.
2. Jhanjara and Patiara known in Himachal Pradesh. This marriage is not legal.
3. Karao in North Western Provinces.
4. Katar or Katyar peculiar to Kshatriyas.

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1. Cl. (vi) omitted by Act No. 2 of 1978, Section 6 and Schedule.
2. See *Ram Prasad Seth* v. *State of U. P.*, 1957 All LJ 439 : AIR 1957 All 411.
3. *Kishan* v. *Sheo*, 23 ALJ 981 : 90 IC 358 ; *See* also Hindu Widow's Remarriage Act, XV of 1856 and Special Marriage Act, 1954.

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5. Natra—a form of marriage in Bombay in which the wife is called Natra wife.[1]

6. Pat—in Bombay and Central Provinces.[2]

7. Patri—among Bairagis in Bengal.

8. Shunga or Sagai in Bengal and U. P.

9. Nadu Veetha Thali—in Madras.

10. Sword Marriage in Southern India. When parties were Sudras, sword wives are held to be permanently kept concubines.[3]

The Act contains only one form of marriage, namely, sacramental form of marriage. Hindus desiring to contract a civil marriage will have to take recourse to the Special Marriage Act, 1954.

4. Inter-Caste Marriages.—Two types of inter-caste marriages were recognised prior to 1949, that is, before the passing of the Hindu Marriages Validity Act, 1949.

1. Anuloma union which signifies the marriage of a male of superior caste with a female of inferior caste.

2. Pratiloma, which means a marriage of a female of superior caste with a male of inferior caste.

The Hindu Marriage Act lays down that inter-caste marriage performed under the Act shall be valid.

A marriage between Brahmin and Non-Brahmin was prohibited in Hindu Law before the passing of the Hindu Marriage Act, 1955. It was held valid according to Hindu Marriage Validity Act, 1949.[4]

The concept of a Hindu marriage now under the Act can only be gathered from a consideration of the relevant provisions of the Act in their proper perspective. The Act overrides all the rules of law of marriage hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all matters dealt with in it. A Hindu marriage under the Act must be solemnised in accordance with the customary rites and ceremonies of at least one of the parties thereto and must fulfil the conditions prescribed for the same.

5. Clause (i) : No spouse must be living—Monogamy.—Clause (i) of this section introduces monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all other. It enacts that neither party must have a spouse living at the time of marriage. The expression "Spouse" means a lawfully married husband or wife. The parties to a void marriage can ignore that marriage it being void *ipso jure*, and contract a valid marriage.[5] Where at the time of the second marriage the husband had obtained a decree for dissolution of marriage with his first wife merely because the pericd of one year prescribed in the proviso (now omitted by Act LXVIII of 1976) to Section 15 had not expired, it cannot be said that the previous wife

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1. *Sama* v. *Bai Wali*, ILR 54 Bom 548.
2. *Kadu* v. *Lola*, AIR 1948 Nag 148.
3. *Maharaja of Kolhapur* v. *Sundaram*, AIR 1925 Mad 917 ; *Diwan* v. *Thakur*, 38 CWN 511 (PC).
4. *Bikas Kumar* v. *Nanda Rani*, AIR 1979 Cal 358 (DB).
5. *Krishni Devi* v. *Tulsan Devi*, AIR 1972 Punj 305.

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was "a spouse living" at the time of the second marriage. The second marriage was not violative of Section 5 (i) and it was not void.[1] A second marriage contracted during period when Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949) was in force marriage being void plaintiff is entitled to declaration to that effect—Principle of *pari delicto* does not apply.[2] A marriage not declared to be void for contravening condition in Clause (i) of Section 5 by District Court—No third person can treat it to be void or have it so adjudicated in any suit or proceeding.[3] The petition for getting a void marriage declared as nullity dismissal of, under Order 9, Rule 8 of C.P.C. - Subsequent petition on the same grounds not barred by Order 9, Rule 9, C.P.C.[4]

6. Section 5, Clause (i) and Section 125, Cr. P. C., 1973. A husband married second wife when the first wife was living. In the second marriage necessary ceremonies were observed as per the religious rites perfectly still marriage being void, the decree for nullity is not necessary. In such a case a woman does not get the status of wife nor the man the status of husband and the application for maintenance under Section 125, Cr. P. C., 1973 is untenable.[5] The term 'wife' appearing in Section 125, Cr. P. C., means only a legally wedded wife. The marriage of a woman who has entered into a form of marriage with a person who already has a wife living at the time, is null and void as being in contravention of Section 5 (i) of Hindu Marriage Act. The fact that Section 11 provides for filing of a petition by either party to have the marriage declared null and void by a decree of nullity does not make the marriage valid till the decree is passed as it the case of voidable marriage under Section 12 of the Act as in such case obtaining of a decree of nullity is not a condition precedent for the marriage being null and void. The fact of the parties having lived together as husband and wife for a long time could be relevant to raise only a presumption in law of they being husband and wife, but such presumption itself is rebuttable on proof of marriage being invalid. And by a woman whose marriage is void under Section 11 because of the provisions of Section 5 (i) of Hindu Marriage Act the person already having a wife living at the time is not maintainable so as to claim maintenance under Section 125, Cr. P. C.[6]

It will be too narrow a construction to hold that in every case whenever an issue of validity of marriage arises having reference to the conditions of Section 5 the matter must be referred or the matter must arise only to the special jurisdiction under this Act. The declaratory and remedial parts of the statute need not be intermixed. When the reliefs of these mentioned in Sections 9 to 13 are sought those provisions are exhaustive and compulsive and exclude the jurisdiction of other Courts. Marriage being a legal relation involving matters of status and title of persons whenever the same is in issue the powers of ordinary Civil Courts are not excluded. The Court can in appropriate cases grant relief of maintenance to woman from the estate of her deceased husband even in its finding that marriage is void.[7]

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1. *Lila Gupta* v. *Laxmi Narain*, AIR 1978 SC 135 (overruling 1971 Cal 397 and reversing ILR (1969) 1 All 97.
2. AIR 1961 Mad 325.
3. *Smt. Sheel Wati* v. *Smt. Ram Naudani*, AIR 1981 All 42.
4. *Smt. Panno* v. *Makholi Ram*, AIR 1981 Him Pra 47.
5. *Bajirao* v. *Tolanbai*, 1979 Mh LJ 693.
6. *Yamunabai Anantrao Adhav* v. *Anandrao Shivram Adhav*, 1982 Mh LJ 871 (FB).
7. *Smt. Rajeshbai* v. *Smt. Shantabai*, AIR 1982 Bom 231.

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7, Section 5, Clause (i) and Section 108 of Evidence Act.—The presumption under Section 108 of Evidence Act that a person not heard of for 7 years shall be presumed dead is restricted to the date of filing of the proceeding and not with reference to any particular date. The proof of allegation of death lies on the person alleging the fact. If the husband by the first marriage who was alive in 1960 was presumed to be not dead on 24-5-70 by application of rule under Section 107 of Evidence Act. The marriage with the petitioner was held null and void.[1]

Section 5 (i) and other provisions of Hindu Marriage Act are protected under Article 25 of the Constitution.[2] Secondly the provisions of Hindu Marriage Act which prohibit bigamy and Rule 27 of U. P. Government Servants' Conduct Rules giving effect to those provisions do not infringe Article 25 of the Constitution.[3] Under Section 5 and 11 a second marriage, with a previously married wife living is null and void[4] The second marriage during the subsistence of first, can be restrained under Section 54 of the Specific Relief Act.[5] Such type of suits are maintainable under Section 9, C.P.C. read with Section 42 of Specific Relief Act. The finding regarding the declaration and injunction in the Court of District Judge is not obligatory.[6]

8. Sections 5, 17 read with Section 494, I.P.C. and Evidence Act, Sections 32 (5) and Section 50, proviso.—The Hindu Marriage Act has while replacing the local statutes relating to the prevention of bigamous marriage, sought to achieve the object underlying the statutes by the provisions made therein and brought the law relating to marriage between Hindus to stand on par with that under Special Marriage Act, 1954 which replaced Act (3 of 1872). In proving the evidence of any relationship by marriage the statements of a person who had special means of knowledge is made admissible under Section 32 (5) of Evidence Act. Section 50 of Evidence Act has rendered an opinion expressed by the conduct of any person who has special means of knowledge on the subject as relevant. But the proviso to Section 50 makes such opinion insufficient to prove a marriage in prosecution under Section 494 I.P.C. The proof of fact of marriage is not to depend on opinion to conduct evidence.

A marriage rendered incomplete for the reasons stated in Section 7 of the Hindu Marriage Act is not considered as either void or voidable in Sections 11 and 12 of the Act. Section 7 is not in the nature of special rule of evidence which enjoins upon the prosecution to establish in all cases by direct evidence the taking of seventh step 'Saptapadi' by the bridegroom and the bride before the sacred fire. Nor can it be said that in the absence of such evidence the prosecution should be considered to have failed to prove second marriage of the accused in cases of bigamy.[7] A claim for maintenance by a woman from a person with whom she entered into a void marriage cannot be entertained.[8]

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1. *Surjit Kaur* v. *Jhajhar Singh*, AIR 1980 Pun & Har 274.
2. AIR 1957 All 411.
3. AIR 1961 All 334.
4. AIR 1964 SC 1625 : 1964 Mad WN 219 : 1964 Cr LJ 590 : 1963 All WR (HC) 377.
5. 1965 All WR (HC) 410.
6. (1964) 2 Andh WR 142.
7. (1962) 2 Cr LJ 308 : AIR 1962 AP 311 (DB).
8. *Bansidhar Jha* v. *Chhabi Chatterjee*, 1967 Cr LJ 1176 : AIR 1967 Pat 277 ; *Naurang Singh* v. *Smt. Sapla Devi*, AIR 1968 All 412.

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9. Clause (ii)—Unsoundness of mind.—Unsoundness of mind may be due to idiocy or insanity, temporary or permanent. The prime question to be answered in connection with validity or otherwise of a marriage alleged to have been contracted between persons either of whom is said to be an idiot or insane person is the question whether that particular person is in a position to comprehend and appreciate the significance of the marriage and its effect and obligations on his status and condition in society. If the answer is in the affirmative, the marriage can not be impugned as invalid. If the answer is in the negative, the marriage is voidable under Section 12 (2) (b).[1] The term 'epilepsy' signifies a disorder of the central nervous system, characterised by recurring explosive nerve cell discharges and manifested by transient episodes of unconsciousness or psychic disfunction with or without convulsive movements. If the wife was suffering from recurrent attacks of epilepsy even before marriage the husband is entitled to a decree of nullity of marriage.[2] If the wife is suffering from 'Schizophrenia' intermittently but to such extent that husband could not reasonably live with her, then divorce can be granted. It is not necessary to prove that mental disorder emited at or before marriage.[3] Schizophrenia is an illness of slow insidious onset developing over years. There may be report of strange, odd inappropriate behaviour. There will be progressive deterioration in the level of performance at work and socially; school reports examination results and the employment record will provide objective and usually reliable indices of intellectual performance, its maintenance or decline.[4] If insanity comel after marriage will not furnish ground for annulment of marriage. Similarly where the party had suffered from occasional derangement of mind prior to marriage but not at the time of the marriage, such marriage cannot be avoided. The standard of proof in such cases must approximate to satisfaction of Court beyond reasonable doubt. A conclusion regarding insanity cannot be drawn on the ground that there existed in a past a cause which might have tended to brought about insanity in a person's family without actual evidence.[5]

There is no provision under the Act to compel wife for medical examination. Adverse inference cannot be drawn on her non-examination when wife was examined twice and the matter could not have improved by her examination again by doctor. Even non-examination of mother of wife cannot raise any adverse inference. The husband has to prove his own case.[6]

10. Clause (iii)—Age of parties to be married.—Section 5 (iii) now requires that at the time of marriage, the bridegroom must have completed the age of 21 years and the bride the age of 18 years. But it does not render nor is there any other provision in the Act which renders void or voidable a marriage violative of this clause.[7] The Andhra Pradesh High Court held in some cases

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1. *Anima Roy* v. *Prabodha*, AIR 1969 Cal 304.
2. *Roshanlal* v. *Smt. Kadembari*, 1979 Rev LR 8 : 81 PLR 23.
3. *Smt. Kiran Bala* v. *Bhairo Prasad Srivastava*, AIR 1982 All 242.
4. *Smt. Rita Roy* v. *Sitesh Chandra Bhadra Roy*, AIR 1982 Cal 138 (DB).
5. AIR 1963 Punj 449.
6. *Smt. Rita Roy* v. *Sitesh Chandra Bhadra Roy*, AIR 1982 Cal 138 (DB).
7. *Naumi* v. *Narottam*, AIR 1963 HP 15; *Premi* v. *Dayaram*, AIR 1965 HP 15; *Mahinder Kaur* v. *Major Singh*, AIR 1972 P & H 184; *Gindan* v. *Barelal*, AIR 1976 MP 83; *Durjyadhan* v. *Bangapati Dei*, AIR 1977 Ori 36.

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that such marriage is void *ab initio*.[1] The full Bench of decision of that High Court has overruled the above mentioned cases in *Venkatramana* v. *State of A. P.*[2] According to the Full Bench, the consequences of marrying in contravention of Section 5 (iii) is that the persons concerned are liable for punishment under Section 18 and further, if the requirements of Section 13 (2)(iv) as inserted by the Marriage Laws (Amendment) Act, 1976 are satisfied, at the instance of the bride a decree for divorce can be granted. Barring these two consequences, one arising under Section 18 and the other arising under Section 13(2) after the enactment of the Marriage Laws (Amendment) Act of 1976 there is no other consequence whatsoever resulting from the contravention of Section 5 (iii) not being a nullity it cannot be pleaded in defence to a petition for restitution of conjugal rights.[3] A marriage in contravention of Section 5 (iii) of the Act could neither be declared *ab initio* void or voidable, where a girl was married while she was minor and after attaining majority came and lived with husband and thereby validated the marriage and condoned the defect the husband could not be refused a decree for the restitution of conjugal rights, on the ground that marriage was in contravention of provisions of Section 5 (iii).[4] The marriage in conravention of the clause is not a nullity and hence such contravention cannot be pleaded as a ground in answer to a petition for restitution of conjugal rights.[5]

The Marriage Laws (Amendment) Act, 1976 (No. 68 of 1976) came into force on 27th May, 1976 amending clause (ii) of Section 5. The age of the bridegroom has been increased from 18 years to 21 years and the age of the bride has been increased from 15 years to 18 years by the Child Marriage Restraint (Amendment) Act, 1978 and consequently Clause (vi) of Section 5 has been omitted to overcome the consent of the guardian to be obtained for the marriage. Previously Act recognised marriage based on consent. The question whether the consent of minors or their guardians was actually in existence at the time of marriage is a question of fact. The fact that no consent was there, cannot be assumed. The question of consent being a mixed question cannot be raised for first time in a writ petition.[6] A suit for recovery of money advanced towards value of jewels to the parents of minor bride is not affected by Section 23 of the Contract Act.[7]

11. Degrees of prohibited relationship : Clause (iv).—This clause enacts that no marriage is valid if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by the custom or usage governing both the parties. The custom which permits of a marriage between persons who are within the degrees of prohibited relationship must

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1. *Suramma* v. *Ganpat*, AIR 1975 AP 193 ; *Palamsetti* v. *Sriramulu*, AIR 1968 AP 375 ; *Krishni Devi* v. *Tulsan Devi*, AIR 1978 P & H 305.
2. AIR 1977 AP 43 (FB).
3. *Mahinder Kaur* v. *Major Singh*, AIR 1971 P & H 174.
4. See *Sukram* v. *Mishri Bai*, AIR 1979 MP 144 (DB) ; *Pinninti Venkataramana* v. *State*, AIR 1977 AP 43 (FB) ; *Dansu* v. *Smt. Manitra*, 1975 Cr LJ 1221.
5. *Mohinder Kaur* v. *Major Singh*, AIR 1972 Panj 184 (DB) : ILR (1973) 2 Punj 713.
6. 1969 All LJ 623 : 1969 All WR (HC) 303.
7. *Rayudu* v. *Dommeti*, AIR 1968 AP 375.

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fulfil the requirements of a valid custom now given statutory sanction by Clause (a) of Section 3 which defines the expressions 'custom' and 'usage'. The custom must not be unreasonable or opposed to public policy. No custom would recognised if it is abhorrent to decency and morality or inconsistent with the practices of good men.[1] The rules relating to "degrees of prohibited relationship" are prescribed in the definition clause Section 3 (g) and have been discussed under that clause. They are based on the principle of exogamy. It will be noticed that the Act deals separately with the questions of prohibited degrees of relationship and sapinda relationship though in same cases both the prohibitions may overlap. The Hindu Marriage Disabilities Removeable Act, 1946, provided that notwithstanding any text, rule or interpretation of Hindu law or any custom or usage, a marriage between Hindus, which was otherwise valid, would not be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara*. Before that enactment came into force it was held that a man could not marry a girl of the same *gotra* or *pravara* the theory being that his father and the girl's father were both descendants of a common ancestor in the male line. Such marriages could only be sanctioned by custom. Section 29 (1) of the present Act re-enacts the above provision of the Hindu Marriage Disabilities Removal Act, 1946, because the latter enactment is now repealed by Section 30. The rules now enacted in this and the next clause simplify the position to a considerable extent. One instance prior to 1955 and two after 1955 showing marriage between parties within the degrees of prohibited relationship in the Dravid Brahmin community would be insufficient to make out a custom relaxing the condition imposed by Section 5 (iv).[2] Example of a custom falling within the relaxation allowed by that clause is that permitting marriage with the maternal uncle's daughter in South India.[3] The marriage within the prohibited degrees is void and not merely voidable and either party to such a marriage can ignore that marriage and contract another lawful marriage without being guilty of bigamy under Section 17 of the Act. Under Section 18 every person who procures a marriage of himself or herself to be solemnised in contravention of clause (iv) is liable to be punished under Section 18 (b). Custom marriage—Entries in Riwaj-e-Am normally carry a presumptive evidentiary value among Aroras permitting marriage between the children of a brother and sister or the two sisters. This custom being in existence for more than 50 years.[4] Held that the custom is proved and the marriage is valid one. The custom or usage permitting marriage between the persons within prohibited relationship is saved. The statements of persons who have personal knowledge about the relation between the parties prior to marriage would be direct evidence and not opinion statements which alone should conform to the requirements of Section 32 of Evidence Act.[5]

12. Sapinda relationship : Clause (v).— This clause enacts that no marriage is valid if it is made between parties who are related to each other as sapindas unless such marriage is sanctioned by usage or custom governing both the parties. The custom which permit of a marriage between persons who are sapindas of each other must fulfil the requirements of a valid custom now given statutory sanction by clause (a) of Section 3 which defines the expression 'Custom' and 'usage'.

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1. *Balusami* v. *Balkrishna*, 1957 AM 97.
2. *Kmakshi* v. *Mani*, (1970) 2 MLJ 477.
3. *Venkata* v. *Subhadra*, ILR 7 Mad 548, 549.
4. *Smt. Shakuntala Devi* v. *Amar Nath*, AIR 1982 P & H 221.
5. *Ibid.*

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Clause (vi) : Prior to the omission of clause (vi) by the Child Marriage Restraint (Amendment) Act of 1978, Section 6 and Schedule, that clause had provided that where the bride had not completed the age of 18 years at the time of marriage the consent of her guardian in marriage was necessary. Since at the present time both the parties must have completed 18 years at the time of marriage under Section 5 (iii) the question of guardian's consent will not be material. But it may well be and often it happens that the bride is below 18 at the time of the marriage. The marriage in such a case is neither void nor voidable.[1] If however, the consent of the girl or her guardian had been obtained to the marriage by force or fraud the marriage will be voidable under Section 12 (1) (c). In view of the deletion of Section 6 the question of guardianship in marriage where the age of bride is below 18 years will fall to be regulated by the sastric Hindu Law.

A noteworthy provision in the former Section 6 was that in sub-section (5) which stated that nothing in the Act shall affect the jurisdiction of the court to prohibit by injunction an intended marriage, if in the interest of the bride for whose marriage consent was required, the court thought it necessary to do so.[2]

6. Guardianship in marriage.—[3][Omitted]

7. Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

SYNOPSIS

1. General.
2. Factum Valet.
3. Validity of marriage by converts to Buddhism.

1. General.—A Hindu marriage under the Act must be solemnized in accordance with the customary rites and ceremonies of at least one of the two parties thereto and must fulfil the conditions prescribed for the same by Section 5 of the Act. The Act, however, does not prescribe the ceremonies requisite for solemnization of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom or usage applicable to either party; and where the form adopted includes the *Saptapadi*, the marriage becomes complete when the seventh step is taken. This rule relating to the essential ceremonies of a Hindu marriage proceeds on the principle that marriage being one of the *Sanskaras* for a Hindu male or female, whether belonging to the twice-born castes or a *shudra*, must be performed with the

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1. *Sivanandy* v. *Bhagavathyamma*, AIR 1962 Mad. 400; *Premi* v. *Dayaram*, AIR 1965 P & H 15.
2. See *Umashankar* v. *Radha Devi*, AIR 1967 Pat 220.
3. Omitted by Act 2 of 1978, Section 6 and Schedule (w.e.f. 1-10-1978).

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necessary religious rites and at the same time recognises the position that the customary rites and ceremonies vary in different parts of the country and also among different castes and communities. It will be seen that though the section emphasizes the importance of the *Saptapadi* it does not insist upon the same because even under the previous law the rule was that a marriage may be completed by the performance of ceremonies other than those referred to above where it was allowed by the custom of the caste to which the parties belonged. It is competent now to any two persons who are Hindus to solemnize a ceremonial marriage under the Act and all that is insisted upon for the solemnization of the marriage is that it must be in accordance with the customary rites and ceremonies of either party to the marriage. The custom cannot be enlarged beyond the usage by parity of reasoning since it is usage that makes the law and not the reason for the thing.

2. Factum Valet.—The doctrine of '*factum valet*' enables to cure the violation of a directory provision of a mere matter of form but does not cure the violation of the fundamental principles or the essence of the transaction. If there are certain essential ceremonies, which are necessary for a marriage, the non-observance of those ceremonies or religious rites cannot be overlooked by applying the doctrine of '*factum valet*'. The doctrine applies only where there is no initial want of authority or where there is no positive interdiction. There are, however, many ceremonies connected with the marriage, which are more or less non-obligatory or directory. If those ceremonies are not performed at the marriage, the omission may be cured by doctrine of '*factum valet*'.

According to Madras High Court there are two essential elements necessary for a valid Hindu marriage '*Panigrahana*' and '*Saptapadi*'. The marriage ceremony must be the customary form and there connot be any modification of it.[1] A Hindu marriage is not merely a sacrament but a civil contract too.[2] Marriage according to Sikh rites—recital of four lavnas essential.[3] Mere tying of *thali* is not enough to establish that a marriage had been solemnized.[4] Even in absence of prescribed ceremonies, exchange of garlands and tying of *thali* in accordance with Section 7-A, constitutes a valid marriage in Tamil Nadu.[5] The customary form of marriage amongst members of Buddhist community converted from Scheduled Castes sometime in 1956, is a valid marriage, though Section 2 of Hindu Marriage Act includes persons converted to Buddhism.[6] In Arya Samaj marriage, *Saptapadi* is a must.[7] It is no pleading as to the form of marriage and custom and evidence thereon, the decree for divorce must be refused.[8] In a case of a caste custom or a custom of any sub-caste it must have been shown to be ancient certain and reasonable and no opposed to public policy and it cannot be enlarged beyond the usage by parity of reasoning since it is the usage that makes the law and not the reason of the

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1. *Deivani* v. *Chidambaram*, AIR 1954 Mad. 657.
2. *A.* v. *B.*, (1952) 54 Bom LR 725.
3. *Smt. Satnam Kaur* v. *Balwant Singh*, 1979 Hindu LR 131 : 1980 Mat. LR 188 : 1979 Yearly Digest, page 495.
4. *Kunchithapadam* v. *Dharchasoundari*, 1969 Mad LW (Cri) 310.
5. *Koodappan* v. *Kothai Nachiarmmal*, 1980 Mad LJ (Cri) 420.
6. *Smt. Baby* v. *Jayant*, AIR 1981 Bom 283.
7. *Ram Awadh* v. *Krishna Nand Lal*, AIR 1981 All 132.
8. *Atmaram* v. *Smt. Kalawati*, AIR 1982 P & H 83 (FB).

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thing. If the factum of marriage is disputed essential ceremonies constituting the marriage must have been pleaded and proved.[1]

According to custom of caste *biradari*, *Pau puja* was done—*Saptapadi* not shown to be one of the ceremonies necessary for a valid marriage according to customs of caste—Hence held that valid marriage has taken place. It is not the law that performance of *Saptapadi* must be proved in every case when the factum of marriage is in question. The extracts of *kutumb* register and electoral roll cannot be said to be inadmissible in evidence. Entries in such registers and rolls being made by public offices there is a presumption about its correctness until displaced by good evidence.[2]

3. Validity of marriage by converts to Buddhism.—The persons converted to Buddhist Community from the Scheduled castes entering into marriage—Ceremoney of marriage comprising of worship and garlanding of photographs of Lord Buddha and Dr. Ambedkar and thereafter reciting before the photographs "बुद्ध शरणम् गच्छामि, धम्मं शरणम् गच्छामि, संघम् शरणम् गच्छामि" garlanding each other and taking oath that as wife and husband they would henceforth conduct towards each other—marriage so performed is legal—Husband after such marriage marrying for the second time commits offence under Section 494 of I. P. C.[3] A marriage to be valid, the tenents of each religion have to be kept in view so that a marriage would be valid only if the ceremony through which it is solemnized is sanctioned by the religion of either party as a customary ceremony.[4] Since Buddhists are treated as a class different from Hindus, if the parties had not converted themselves into Buddhism at the time of marriage, in the absence of proof of the Buddhist form of marriage having been recognised as a custom in the particular caste to which the parties belong, their marriage according to Buddhist rites cannot be treated as a valid marriage.[5] Merely going through ceremonies with the intention that the parties be taken to have been married will not make them ceremonies prescribed by law or approved by custom.[6] The marriage celebrated without the performance of the *Homam* and *Saptapadi* are valid in the Reddy community of the Telangana area.[7] Ceremonies as *Saptapadi* not gone through—Presumption that this ceremony was gone through, cannot be raised from mere presence of priest—Marriage does not become complete and binding.[8] No presumption can be drawn that essential ceremonies were performed when the marriage has been alleged in accordance with vedic rites. The proof of *Panigrahan* and *Saptapadi* is essential even amongst Sudra.[9] Impotence to be a valid ground of defence, should be

1. *Smt. Bibbe* v. *Smt. Ramkali*, AIR 1982 All. 248.
2. *Smt. Rajdei* v. *Lautan*, AIR 1980 All 109.
3. *Babi w/o Jayant Jagtap* v. *Jayant Mahadeo Jagtap and others*, 1981 Mh. LJ 614.
4. *Ravinder Kumar* v. *Kamal Kanta*, 1975 Rev LR 347.
5. *Shakuntala* v. *Nilkanth*, 1971 Mh. LJ 310.
6. *Bhaurao* v. *State of Maharashtra*, AIR 1965 SC 1964.
7. *Dolgonti Raghava Reddy*, In re, (1970) 2 MLJ 193 : 83 Mad LW 315 ; *Rabindranath* v. *State*, 1967 An. WR 284 : AIR 1968 AP 117.
8. See *Phankari* v. *The State*, AIR 1965 J & K 105 (DB).
9. AIR 1963 Punj 235 : AIR 1966 Him Pra 20.

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continuous from the date of marriage upto date of proceeding.[1] Solemnization of marriage—essentials—invocations before sacred fire and *Saptapadi*—Absence of either invalidates marriage.[2] If the second marriage is not solemnized in proper form, no offence under Section 494, I. P. C. is committed as there is no valid marriage.[3] A mere declaration by a person that he had accepted other party as his wife is not a substitute for sacramental form marriage.[4] The performance of ceremonies will be presumed if factum of marriage is established.[5]

8. Registration of Hindu marriage.—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do. Provided that the entries of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf, shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu marriage Register shall, at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu Marriage shall, in no way, be affected by the omission to make the entry.

COMMENTS

The Registration of Hindu marriages is provided mainly for the purpose of providing an easy proof. The marriage under this Act may be registered under Section 15 of the Special Marriage Act (43 of 1954) and on such registration the marriage shall be deemed to be a marriage solemnized under the Special Marriage Act (Section 18). Non registration will not invalidate the marriage. It is made punishable with fine. The marriage register is

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1. AIR 1965 Mys. 165.
2. AIR 1970 Mys 201.
3. 1969 Mad LW (Cr) 257 (DB).
4. ILR (1974) Cut. 882.
5. *Gurucharan* v. *Adikanda*, AIR 1972 Orissa 38.

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open for inspection at all reasonable hours, and shall be admissible as evidence of the statements contained therein. The marriage register is a public document by virtue of Section 74 of the Evidence Act. And certified copy of the register or any part thereof issued under Section 76 can be produced in proof of its contents under Section 77 of that Act. The omission to make the entry in the marriage register shall not make the marriage duly celebrated void. This is a concession made to the sentiment of the orthodox Hindus who do not like to be aligned with Christians and others whose marriages require registration in the marriage register. In view of the provision in Section 8 (5) even the State Government makes rules for compulsory registration of marriages there can not be a rule invalidating a marriage for want of registration. Even prior to Hindu Marriage Act, the then State of Bombay had enacted the Bombay registration of Marriages Act, 1953, which has not been repealed since then. In *Rabindra Kumar* v. *Smt. Prativa*,[1] it was held that the marriage alleged to have been celebrated according to Hindu rites—Charge under Section 494, I·P.C.—Nature of evidence required —proof—the entry of marriage Register is sufficient proof of the marriage having been celebrated according to Hindu Rites.

Restitution of Conjugal Rights and Judicial Separation

9. Restitution of conjugal rights.—[2][(1)] When either the husband of the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[3][*Explanation*.—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society].

[4][(2) * * *].

SYNOPSIS

1. Retrospective operation of the Act.
2. Restitution of conjugal rights.
3. Withdrawing from the society of the other.
4. Matrimonial home.
5. Reasonable excuse for withdrawal from society.
6. Unreasonable excuses for withdrawing from the society of the other spouse.
7. Conduct of parties.
8. Burden of proof and evidence.

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1. AIR 1970 Tripura 30.
2. Figure (1) omitted by the Marriage Laws (Amendment) Act, 1976.
3. Explanation inserted by the Marriage Laws (Amendment) Act, 1976.
4. Sub-section (2) omitted by *ibid*.

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9. Form of the decree and mode of execution.
10. Decree and subsequent separation.
11. Effect of decrec.

1. Retrospective operation of the Act.—A statute relating to matters of procedure operates retrospectively, unless otherwise provided, but that one affecting vested rights or the question of jurisdiction of a Court does not operate retrospectively and its operation is prospective, unless the contrary is by express provision or by necessary intendment.[1]

If either of the spouses refuses to live with the other the remedy for the aggrieved party is to bring a suit for the restitution of conjugal rights. This is the rule of Hindu Law. The Hindu Marriage Act provides for the same rules of restitution of conjugal rights. For jurisdiction and procedure see Section 19 to 28 below.

2. Restitution of conjugal rights.—Suits for restitution of conjugal rights were not contemplated by Hindu Law proper. The concept of the existence of the Court's power to give this relief was borrowed from English Law. To maintain a petition under Section 9 for restitution the other party must have left the petitioner or withdrawn from cohabitation without reasonable excuse. The Court that can take cognisance of the petition is District Court as defined in Section 3(b).[2] The existence of a separation agreement is no bar to a petition for restitution of conjugal rights.[3] Deprivation of either spouse of conjugal company of the other is as much common in the one sex as in the other and is due frequently to trivial as well as grave reasons. In the interest of institution of the marriage on which depends the stability of any civilised states, some safeguards should be provided against two hasty separation and remedies made available for approachment and reconciliation. Either spouse can institute proceedings in Court for directing the other spouse to give back the conjugal society which has been unreasonably withdrawn. In the matter of breaking of conjugal rights it may happen in a particular case that the petitioner is more guilty than the respondent in matter of creating causes and circumstances which forced and justified the latter from breaking away from the petitioners company, and if the Court comes to the conclusion, it is so, it willnot decree restitution. Where in a suit for restitution of conjugal rights the validity of the marriage itself is disputed, the Court must find that the necessary rites and ceremonies have been performed without being contents nearly with a finding that the marriage had taken place.[4] Even where relationship as husband and wife is denied the Court will determine whether there is such relation and decide whether a decree for restitution should be granted.[5]

3. Withdrawing from the society of the other.—In order to sustain a petition for restitution of conjugal rights, it is neces sary to establish that the respondent has withdrawn from the society of the petitioner. The society means conjugal society. Where by working conditions of the wife and the

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1. *Balwant Singh* v. *Sardarni Balwant Kaur*, AIR 1957 Pepsu 1 (DB).
2. *Thirumal Naidu* v. *Rajamal*, (1967) 2 MLJ 484 : 80 Mad LW 472.
3. *Sushila Devi* v. *Madhusudan*, (1971) SCWR 538.
4. *Kuntadevi* v. *Kaluram*, AIR 1963 Punj 235.
5. *Gurdial Kaur* v. *Mukund Singh*, AIR 1967 Punj 235.

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implied arrangement arrived at between the spouses the wife had taken service in a school, at a certain place and the husband had at all times access to the wife and in fact had lived with her at that place there was no virtual withdrawal by the wife from the society of the husband. It is a case of enforced separation necessitated by the service condition of the wife and unavailability of service at the place where the husband resided.[1] Where even at the date of marriage the wife was in employment far away from the place of residence of the husband and for four years both of them used to live together and cohabit during vacation or holidays and later on she resigned her job and lived with the husband but due to some unhappy developments she again joined service at another place stating that her husband could come and stay with her whenever he choose and she was also prepared to go and reside with her husband where he was serving during vacation and other holidays, it could not be said that the wife had withdrawn from the society of the husband.[2] Where a husband and wife are living in the same house but occupying different rooms, and the husband never talks to the wife and does not give her his company, though he gives her sufficient funds for her food and clothing and other comforts, the question may arise whether in such circumstances the petition by the wife for restitution of conjugal rights against the husband will lie. The wife is entitled for decree for restitution of conjugal rights on the ground that the husband has withdrawn from her society without reasonable cause. The Court has jurisdiction to grant alimony under Section 25.[3] It must be remembered that in a petition for restitution of conjugal rights the prayer is that the other party thereto be ordered to return to or to receive the petitioner and render conjugal rights. These rights includes what is known as consortium in which is implicit what may be called matrimonial cohabitation which may or may not include matrimonial intercourse depending upon the age of parties and their health and inclinations. An offer by the husband to live under the same roof with his wife which party being free from molestation by the other was held not an offer of matrimonial cohabitation. Normally withdrawing from one's society connotes separation and going away and living elsewhere with intention not to come back. Mere temporarily withdrawal by the wife from the society of the husband did not amount to withdrawal from the society of the husband when she had no animus to withdraw permanently from such society.[4] Nor can the question of the wife withdrawing herself from the husbandarise where the spouses had not been able to decide where the matrimonial home should be set up.[5]

Where in an application by husband the wife raises the defence of desertion by the husband by going away to another place and the husband proves that even before his going away the wife refused to join him for establishing a home, the defence of the wife should not be entertained and upheld.[6] Habitual nagging of wife by husband's parents, though no cruelty was ascribable to husband, the wife could not asked to return to the family

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1. *Pravinben* v. *Sureshbhai*, AIR 1975 Guj. 69.
2. *Mirchumal* v. *Devi Bai*, AIR 1977 Raj 113.
3. *Smt. Sandhya Bhattacharjee* v. *Gopinath Bhattacharjee*, AIR 1983 Cal. 161 (DB).
4. *Rameshchandra* v. *Premlata*, AIR 1979 MP 15 ; *Ratnaprabhabai* v. *Sheshrao*, AIR 1972 Bom 182.
5. *Garg* v. *Garg*, AIR 1978 Delhi 296, 303.
6. *Shakuntlabai* v. *Baburao*, AIR 1963 MP 10 ; *Tulsa* v. *Pannalal*, AIR 1963 MP 5.

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home to stay with husband and his parents and hence petition for conjugal rights by the husband must fail.[1] The wife who deserted husband on his failure to supply money demanded of him and further wife failed to prove maltreatment, turning her out of his house, and living in adultery by husband, he petition for restitution of conjugal rights was allowed.[2]

4. Matrimonial Home. - The main objectives of the Hindu Marriage were *praja* (Begetting of male progeny to cater to spiritual needs) and *Dharmasampathi* (Discharging duties of *Dharma* including social responsibility). A Hindu wife on marriage passed into her husband's family. The relationship between the spouses imposed a duty on the husband to protect his wife, to give her home, to provide her with comforts and necessity of life. It enjoined on the wife the duty of attendance, obedience to the husband and to live with him wherever he chose to reside.[3] Even today this duty is as much a rule as it ever was.[4] In early times the husband was the bread-winner—The wife stayed at home. Therefore the husband decided the locus of the matrimonial home—The wife had little or no voice in it. Social and economic life of the Hindus has however undergone changes with the passage time. A wife may have to live by herself, while the husband is living at a place where he can not take his wife with him. Again the husband may not always be the only or even the chief bread-winner of the family—The wife also may have had to take employment at another place and may earn even more than the husband. Or it may be that the husband is without a job and the wife alone is the earning member. Yet again there may arise case is of women having a child or children by an early marriage while being employed and contracting a second marriage. In situations like these questions such as the husband's right to insist on the wife giving up her job and stay with him and the wife's right to participate in the choice of a matrimonial home have come up before the courts. The decision in *Kailash Wagi* v. *Ayodha Prakash*,[5] seems to hold that even in such situations the husband has a right to decide the matrimonial home must be at the place where he happens to reside and the wife should resign her job and come to live with him there[6] suggests that on general principles, the husband acting *bona fide* is entitled in law to determine the locus of the matrimonial home in such cases. In *Shanti Nigam* v. *Ramesh Chandra Nigam*,[7] it is held that where wife feels that it is necessary for her own upkeep and bringing up of her children that she should work, the decisive voice must be her own and if there is disagreement on the point between the spouses the husband can not compel her to take a different line and the court can not grant restitution of conjugal rights in his favour. The basic principles on which the location of the matrimonial home is to be determined are based on the common conveniences of the spouses and balance of circumstances, that the principle that the wife is not

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1. AIR 1979 Orissa 85 (DB) : *Rabindranath Brrik* v. *Pramila Bala*, (1979) 47 CLT 182 (DB).
2. *Malkiate Kaur* v. *Phuman Singh*, 1979 Hindu LR 229 (Punj).
3. *Surinder Kaur* v. *Gurdeep Singh*, AIR 1973 P & H 134 ; *Pothuraju* v. *Radha*, AIR 1965 AP 407 ; *Radha Krishnan* v. *Dhan Laxmi*, AIR 1975 Mad 331 : (1975) 1 MLJ 439.
4. *Sushiladevi* v. *Madhusudhan Kisan*, (1976 42 CLT 725.
5. 1977 Hindu LR 175 (FB .
6. *Surjit Kaur* v. *Ujjan Singh*, (1978) 80 Punj LR 693.
7. (1971, All LJ 67.

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entitled to separate residence and maintenance except for justification and otherwise the spouses are expected to live together in the matrimonial home is only where the wife depends on the husband financially. Where the circumstances are equally balanced in favour of the wife and husband then there would be a stalemate and neither of them would be able to sue the other for restitution of conjugal right. Delhi decisions overlooks the fact that the Hindu Marriage still not wholly secular and carries much religious significance. Relaxation of the ancient rule needed in the case of working wives who are better situated than their husbands to choose the place of the matrimonial home does not call for a repudiation of the rule itself. The concepts of protection of the husband are not inelastic and rigid which can not moulded in the contest of present day conditions and needs of the society.[1] Nor is it useful to invoke the analogies of English Law in this matter in view of the differences in the conditions and culture of the society.[2] In *Roshanlal* v. *Basant Kumar*,[3] it is pointed out that generally speaking the husband being the wage earner has the right to say where he would keep his wife, though this does not mean that the wife has absolutely no say in the matter. Like all reasonable people both parties should amicably decide as to the place of their joint residence, whether in the parental house of the husband or in a separate residence. If either of them assumes an unreasonable stand which necessarily results in separation between the spouses, it would be that party that should be condemned as guilty of desertion.

5. Reasonable excuse for withdrawal from society.—A petition for restitution of conjugal rights is not maintained on the ground of withdrawal from the society of the petitioners. Unless it is shown that the withdrawal without reasonable excuse. The word "excuse" appears to have been advisedly used. It is something less than 'justification' and something more than mere whim, fad, or brain wave of the respondent. It is fact which is to be determined with reference to the respondent's state of mind in the particular circumstances of each case.[4] If the court comes to the conclusion that there reasonable grounds for the withdrawal and that the respondent will justified in living away, such justification is due to the respondent or other circumstnces. For which the petitioneor is responsible, the petition will be dismissed under this section read with Section 23.[5] The acid test is to find out whether the conduct of the petitioner has being such as to render if practically impossible for the spouses to live properly together and for the duties of the married life to be discharged. No doubt the cause must be serious and grave and the onus of proving such cause is on the party asserting it. The question whether conduct falling short of cruelty or any other matrimonial offence can be justified one spouse in living another has been debated in England and Jud icial opinion on the question is not wholly uniform. But the more recent and acceptable view seems to be that the "just cause" must be "grave and weighty" or as it is sometimes said "grave and convincing" and that it may be distinct from a matrimonial offence.

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1. *Mirchumal* v. *Devibai*, AIR 1977 Raj. 113, 116.
2. See *Sushila Devi* v. *Madhusudhan Kisan*, (1976) 42 CLT 725.
3. (1967) 69 Punj LR 567.
4. *Sadhusingh* v. *Jagdish Kaur*, AIR 1969 P & H 139 ; *Krishnamurti* v. *Syamanthaskamani*, (1976) 2 Kant LJ 361.
5. *Mst. Gurdev* v. *Sarwansingh*, AIR 1959 Punj 162.

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The following grounds have been recognised as valid grounds for separate living disentitling the others spouse to a decree for restitution of conjugal rights. : —

(a) Grossly indeccnt behavior.

(b) Extra-vagance of living on the part of the wife affecting the financial position and prospects of the husband.[1]

(c) Excessive drinking carried to such degree as to render it impossible for the duties of married life to be discharged.

(d) Persistence in a false charge against the respondent of having committed an unnatural offence.

(e) Refusal of marital intercourse without sufficient reason.[2]

(f) Apprehension of violence due to development of insanity in the petitioner.

(g) Agreement to live separate,[3]

(h) Misconduct approaching cruelty but following short of it.[4]

(i) Imputation of unchastity persisted in by the husband.[5]

(j) Cruelty.[6]

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1. *G* v. *G* 1939 p 32.
2. *Devis* v. *Devis*, 1918 PC 85 ; *Jagdish Lal* v. *Shyama Madan*, AIR 1966 All 1506.
3. Cf. *Chinnaperumal* v. *Mariyee*, AIR 1976 Mad 179.
4. *Mst. Gurdev* v. *Sarwan Singh*, 1959 Punj 162 ; *Shanti Devi* v. *Babbi Singh*, AIR 1971 Delhi 294 ; *Krishnamurthy* v. *Shyamanthakamani*, supra.
5. *Sara Abraham* v. *Pyli Abraham*, AIR 1959 Ker 75 ; *Premi* v. *Dayaram*, AIR 1965 Him Pra 5 ; *Kusum Lata* v. *Kamta Prasad*, AIR 1965 All 280 ; *Revanna* v. *Suseelamama*, AIR 1967 Mys 165 ; *Bajo Date* v. *Aloka Jaw*, AIR 1969 Cal 477 ; *Sumanbai* v. *Anandrao*, AIR 1976 Bom 212 ; *Sushil Kumari* v. *Prem Kumari*, AIR 1976 Bom 321 ; *Karnail Singh* v. *Bhupinder Kaur*, AIR 1973 P & H 19 ; *Mohinder Kaur* v. *Bhagram*, AIR 1979 Punj 71 ; AIR 1967 Punj 397 ; AIR 1963 Punj 242.
6. *Siddalingayya* v. *Smt. Lakshamma*, AIR 1968 Mys 113 ; *Dalip Singh* v. *Paranjit Kaur*, 1971 Cur LJ 584 ; *Pramilabala* v. *Rabindranath*, 1976 (2) CWR 930 ; *Ashwini Kumar* v. *Swatantar*, (1978) 80 Punj. LR 573 ; *Shanta Wadhwa* v. *Purushottam Wadhwa*, 1979 Mah LJ 661 (DB) ; *Smt. Sulochana* v. *Ramkumar Chauhan*, AIR 1981 All 78 ; *Medashetti Satyanarayan* v. *Medashetti Veeramani*, AIR 1981 AP 123 (DB) ; *Siraj Mohammed Khan* v. *Hafizunnisa*, AIR 1981 SC 1972 ; *Smt. Krishnamram* v. *Chunilal Gulati*, AIR 1981 P & H 119 ; *Parasram* v. *Kamlesh*, AIR 1982 P & H 60 (DB) ; *Smt. Pushpa Rani* v. *Krishanlal*, AIR 1982 Delhi 160 ; *Smt. Lajwanti Chandhok* v. *O. N. Chandhok*, AIR 1982 Delhi (NOC) 111 ; *Smt. Gurubachan Kaur* v. *Sardar Sawaran Singh*, AIR 1978 All 255 ; *Jia Lal Abrol* v. *Sarla Devi*, AIR 1978 J & K 69 (FB) ; *Smt. Indu Gupta* v. *Rajeshwar*

(*Contd. on page* 36)

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(k) Financial difficulty of husband and comfortable position of wife in employment at another place.[1]

(l) Husband insisting on wife taking non-vegetarian diet and to drinking habits.[2]

(m) Husband issuing to wife's father and other relations invitations for another marriage by him.[3]

(n) Respondent's working necessary for upkeep and bringing up other children by a previous marriage.[4]

(o) Husband living with another woman and having sexual relations with her.[5]

(p) Abandonment of wife by petitioner for a long time.[6]

(q) Husband's falsely alleging that wife has married again and is living in adultery.[7]

(r) Impotency of either spouse.—In matrimonial cases, impotency of the husband has been understood as meaning his incapability to consummate the marriage to have conjugal intercourse, which is one of the objects of the marriage. A sterile person need not necessarily be impotent. In some cases, however, a person may be sterile as well as impotent. Further impotency may be due to a temporary absence of desire for sexual intercourse, timidity, sexual over-indulgence, or other psychological reasons.[8] Full and complete penetration is an essential ingredient of ordinary and complete intercourse. The degree of sexual satisfaction obtained by parties is irrelevant.

(*Contd. from p.* 35)

Prashad, AIR 1982 Delhi 344 : AIR 1975 All 337 ; AIR 1971 Delhi 294 ; AIR 1973 Pun 134 (DB) ; AIR 1973 Punj 19 : (1972) 74 Punj LR 71 : 1972 Cur LJ 156 ; 1971 Cur LJ 584 : (1962) 40 Mys LJ 784 (DB) ; AIR 1966 All 150 ; 1962 Nag LJ (Notes) 24 : AIR 1965 J & K 95 (DB) ; AIR 1970 Mad 434 : (1970) 74 Cal WN 524 ; AIR 1969 Cal 477 (DB) ; AIR 1966 All 150 : AIR 1968 Mys 115 ; AIR 1967 Mys 165 ; AIR 1967 Ori 80 ; AIR 1967 Punj 397 ; AIR 1967 MP 204 ; *Shankuntlal* v. *Ramkrishna*, 1962 NLJ (Note) 24.

1. *Garg* v. *Garg*, AIR 1978 Delhi 296 ; *Radhakrishnan* v. *Dhanlakshmi*, (1975) 1 MLJ 439 : 1975 Mad 331.
2. *Chand Narain* v. *Saroj*, AIR 1975 Raj 88.
3. *Ibid.*
4. *Shanti Nigam* v. *Rameshchandra Nigam*, 1971 All LJ 67 ; *Mirchumal* v. *Devi Bai*, 1977 Raj 113.
5. *Somraj* v. *Abraham*, 1970 Mad 434 ; AIR 1962 Punj 183 ; AIR 1963 Mys 118 (DB) : 1962 MPLJ (Notes) 93 : 1965 MPLJ 529 : 70 Punj LR 691 : (1968) PURLJ 442.
6. *Chitti Venkamama* v. *Mahalakshmi*, (1976) 2 An WR 45 : (1976) 1 APLJ 207 ; Cf. *Ishwari Devi* v. *Mathura Das*, AIR 1969 Cur LJ 319 ; *Atmaram* v. *Smt. Narbada Devi*, AIR 1980 Raj 35.
7. *Mohinder Kaur* v. *Bhag Ram*, AIR 1979 P & H 71 ; *Smt. Sumanbai* v. *Anandrao*, AIR 1976 Bom 212.
8. *Usman* v. *Inderjit*, AIR 1977 P & H 97 (DB).

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Where the respondent suffering from the disease of vaginismus and coitus and complete penetration was not possible, impotency is to be presumed.[1] Wife with artificial vagina of three inches depth and wife was not capable of sexual intercourse and as such the husband could not consummate marriage as penetration was only for one inch or so. Such an imperfect and partial intercourse is not consummation.[2] The effect of prolapse of uterus of the wife leading in non-consummation of marriage is impotency. The question of curability is immaterial.[3]

(s) **Insanity or epilepsy of either spouse.**—If the wife is suffering from recurrent attacks of epilepsy even before marriage the husband withdrawing from the society of the wife is justified.[4] The factum of suffering of wife from incurable schizophrenia is just ground for the husband to withdraw from the society of the wife.[5]

(t) Adultery by either spouse.[6]

(u) Sodomy by husband.[7]

6. Unreasonable excuses for withdrawing from the society of the other spouse.—(a) Mere frivolity, levity or even impropriety, falling short of adultery and giving no reasonable ground for belief that it has been committed.

(b) Mere frality of temper and habits which are distasteful to the other spouse, even though as the result of neurosis.

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1. *Samor Roy Choudhary* v. *Smt. Shigdha Roy Choudhary*, AIR 1977 Cal 213 ; *Rajendra Prasad* v. *Smt. Shantidevi*, AIR 1978 Punj 181 : 79 Punj LR 514 ; *Shri Ashokumar Ahluwalia* v. *Smt. Nirmal Kanta*, 1978 Mah LR 1 (Delhi) : 1978 Rajdhani LR 36.
2. *Smt. Sushila Agarwal* v. *Vijaykumar Agarwal*, AIR 1982 Delhi 272 ; AIR 1982 Bom 400.
3. *P. Appellant* v. *K. Respondent*, AIR 1982 Bom 400 : AIR 1967 Mys 165 ; AIR 1967 Orissa 80.
4. *Roshanlal* v. *Smt. Kadembare*, 1979 Rev LR 8 : 81 PLR 232.
5. *Smt. Asha Shrivastava* v. *R. K. Shrivastava*, AIR 1981 Delhi 253 ; *Smt. Rita Roy* v. *Siteshchandra Roy*, AIR 1982 Cal 138 (DB).
6. 1965 MPLJ 529 ; 1962 MPLJ (Notes) 90 ; AIR 1963 Mys 118 ; AIR 1962 Punj 183 ; 1958 MPLJ (Notes) 97 ; 70 Punj LR 691 ; ILR (1969) 1 Punj 251 ; (1968) Cur LR 442 ; AIR 1967 Punj 397 ; AIR 1970 Cal 266 ; AIR 1966 MP 130 ; AIR 1969 Mad 235 (DB) ; AIR 1967 Mad 85 ; (1975) 2 APLJ (HC) 243 (DB) ; *Lalita Devi* v. *Radha Mohan*, AIR 1976 Raj 1 ; *Smt. Sulochana* v. *Ramkumar*, AIR 1981 All 78 ; *M. Akkamma* v. *M. Jagannatham*, AIR 1981 AP 269 (B) (DB) ; *Sardarsing* v. *Smt. Resham*, AIR 1982 All 52 (C) ; *Smt. Pushpa Rani* v. *Krishnalal*, AIR 1982 Delhi 107 (B) ; *Soundarammal* v. *Sundra Mahalinga Nadar*, AIR 1980 Mad 294 ; *Dr. Sarojkumar Sen* v. *Dr. Kalyan Kanta Roy*, AIR 1980 Cal 374 (DB) ; *Smt. Sulekh Bairagi* v. *Prof. Kamla Kanta Bairagi*, AIR 1980 Cal 370 (DB) ; *Binod Anand Lakra* v. *Smt. Belulah Lakna*, AIR 1982 Pat 213 (SB) ; *Smt. Swayamprabha* v. *A. S. Chandrasheker*, AIR 1982 Kant 295 (DB).
7. *K. V. Ravanna* v. *Suseelama*, AIR 1967 Mys 165.

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(c) Habits of intemperance even if prolonged and accompanied by untrue accusations and hysterical outbursts.

(d) Existence of differences on account of the wife's inability to agree with the step-children.

(e) Discovery of premarital misconduct which has not resulted in pregnancy with another man at the time of the marriage.

(f) Development of insanity after marriage which does not give rise to a reasonable apprehension of violence.

(g) Agreement between husband and wife to live separately.[1]

(h) Mere poverty or non-earning condition of the husband.[2]

(i) Husband's failure to find independent livelihood for himself and his wife.[3]

(j) Non-payment by husband of interim maintenance.[4]

(k) Acceptance by wife of service without husband's consent at a place different from his home.[5]

(l) Mere consumption of alcohol.[6]

In *Hardip Singh* v. *Smt. Dalip Kaur*,[7] it was held that where a husband was justified in raising to set up a separate house from his parents to satisfy his wife, the refusal cannot be a valid ground for the wife to live separately from the husband and resist the husband's suit for restitution of conjugal rights or claim separate maintenance for herself and the children. Where the residence of aged parents with the husband does not create circumstances grave enough to subvert the wife's right of consortium, the wife has no right to separate residence with the husband away from the parents.[8] Where the husband was employed as a teacher and his family owned some land and there was nothing to suggest that he was not in a financial position to support his wife, and his demand that his wife should live with him after resigning her job elsewhere was *bona fide*. The wife will be deemed to have withdrawn herself from his society without reasonable cause.[9] Where the facts showed that the wife was guilty of undermining the atmosphere of matrimonial love and had without reasonable excuse withdrawn from the society of the husband a decree against the wife for restitution of conjugal rights is proper.[10] A pre-

1. *Tirumal Naidu* v. *Rajammal*, AIR 1968 Mad 201 : (1967) 2 Cr LJ 484 : 80 LW 422 : ILR (1968) 3 Mad 275 ; *Pothuraju* v. *Radha*, AIR 1965 AP 407 ; *Chinna Perumal* v. *Marityayee*, AIR 1967 Mad 179.
2. *Surinder* v. *Mohinder Singh*, ILR (1968) 1 Punj 339.
3. *Mehta* v. *Aye Maungu*, AIR 1931 Rang 111.
4. *Gindan* v. *Barelal*, AIR 1976 MP 83.
5. *Gaya Prasad* v. *Bhagwati*, AIR 1966 MP 212 ; *Surinder Kaur* v. *Gurdeep Singh*, AIR 1975 P & H 134.
6. *Chand Narain* v. *Saroj*, AIR 1975 Raj 88.
7. AIR 1970 Punj 284.
8. *Kanthimathi* v. *Parmeshwara Iyer*, AIR 1974 Ker 124.
9. *Surjit Kaur* v. *Ujjal Singh*, (1978) 80 Punj LR 693.
10. *Jaswinder Kaur* v. *Kulwant Singh*, (1978) 80 Punj LR 649.

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marriage agreement that husband should live in wife's father's house can not furnish a ground for restitution as wife is bound to live with her husband wherever he resides.[1] Atrivial hardships and differences which are incidently to the ordinary wear and tear of married life, can not be viewed as reasonable excuse for one spouse withdrawing from the society of the other.[2] If the wife has refused to go to her husband to establish home even before his departure to another place she can not raise a defence of desertion by the husband in an application under Section 9.[3] A suit by wife for maintenance on the grouad of husband's cruelty was compromised and the parties lived together. A subsequent conduct of husband though not amounting to actual cruelty was not such as to create confidence and enable her to live with him. Application by husband for restitution of conjugal rights was held to be not *bona fide*.[4] In proceeding under Section 9 a husband alleged hardship as he has been deprived of the company of both the wives, can not be taken into consideration in giving effect to provision of law which does not present any ambiguity.[5] The grievances of normal incidents of married life like husband's demand for money or his taking away of ornaments can not be regarded as reasonable excuse or cruelty.[6] If the husband declines offer of wife to live with him and only insisting that wife should go and live with his parents can not furnish the husband a ground for restitution of conjugal rights.[7] An application for restitution of conjugal rights by husband after ten years from withdrawal by wife from his society without satisfactory explanation is not tenable.[8] The allegation of the wife that she does not like her husband or does not want to live with him because he is too poor or is otherwise not fit to be a proper life companion for her, can not be considered as a reasonable excuse.[9] If the wife accepts service without husband's consent at place different from husband's home to augment husband's family income. And the husband calling upon her to live service and live with him at his place to which the wife refused to obey but requested him to come and stay with her, assumes withdrawal without reasonable excuse by the wife from the husband's society.[10] In a case where there has been no completed act of sodomy but a mere request by the husband for participation by the wife and wife's refusal can not be pleaded as a defence to the husband's application under Section 9.[11] If the husband's income is sufficient to maintain the wife comfortably the wife's contention that she would not live service to reside with the husband, a reasonable inference could be drawn that she had withdrawn her husband's society without reasonable excuse.[12] A single instance of quarrel between the husband and wife is not sufficient reason for the wife to live away from the husband.[13] If the wife refuses to obey the decree passed against her for

1. AIR 1965 AP 407 (DB).
2. (1962) 40 Mys LJ 784 (DB).
3. AIR 1963 MP 10 (DB) : 1963 Jab LJ 105.
4. AIR 1964 Mad 482.
5. AIR 1963 Mys 118 (DB).
6. AIR 1960 Punj 493.
7. AIR 1965 J & K 95.
8. AIR 1969 Pat 27.
9. AIR 1970 MP 36.
10. AIR 1966 MP 212.
11. AIR 1967 Mys 165.
12. 1975 Hindu LR 388 (Punj).
13. 1975 Hindu LR 24 (Punj).

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restitution of conjugal rights she is not entitled to claim any maintenance and the defaulting spouse was held to have withdrawn from the society of the other without reasonable excuse.[1] A wife staying away from her husband on the ground that he refused to migrate to her native place is considered as unreasonable excuse.[2] Where enforced separation was necessitated by the service condition of the wife and unavailability of service where the husband resided and the husband had at all times access to the wife it was held that there was virtual withdrawal by the wife from society of the husband.[3]

The court is to be guided by the fundamental and basic rule that it is the right of each spouse to have the society and consortium of the other. So long as the residence of the aged parents of the husband under the same roof with him is not provocative of creating circumstances grave enough to subvert the wife's right to consortium of her husband, the wife has no right to separate residence with her husband away from her parents.[4] A woman of modern times is entitled to insist that her husband should treat her with dignity and self-respect befitting the status of a wife and that her life with her husband will be peaceful and happy. Even if the husband satisfied the condition stipulated in Section 9 (1) the Court will still have discretion to grant or deny the relief of restitution, depending on the circumstances of each other.[5] A mere temporary withdrawal by the wife from the society of the husband does not amount to withdrawal from society permanently.[6] Both the parties were misbehaving with each other and were critical to each others actions. In many marriages each party can, if so wills, discover many a cause for complaint but such grievances arises mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty. Unroly temper of the spouse or matrimonial wranglings can not be said to amount to cruelty, nor would it be sufficient to show that the other spouse is whimsical, exacting, in-considerate and irascible. In compatability of temperament, negligence or want of affection, wounding the feelings of other or expression of hatred or the like would not be regarded by themselves, as cogent grounds for relief. Meanness, stinginess, shiftessness, selfishness, or defects of temperament cannot themselves amount to cruelty. The court has to take account of the ordinary weaknesses and failings and short-comings and should not be satisfied unless grave and substantial causes are established. Unhappiness in marriage *per se* also does not amount to cruelty. The court has to bear in mind that husband and wife are made for each other and there is no question of give and take policy between them.[7] Where wife is aggrieved with the conduct of mother-in-law and the husband witnessed it as a helpless observer, can not be characterised as "Cruelty" towards wife and she is not entitled for any relief.[8]

7. Conduct of parties.—No law can parmit a decree for restitution of conjugal rights against a wife where the wife is not directed to resume cohabitation with her husband, but directed to live with the parents of the

1. 1974 Chand LR (Cri) 217 (Punj.).
2. AIR 1973 Punj 355.
3. AIR 1975 Guj 69 : 1975 Hindu LR 235.
4. AIR 1974 Ker 124 (DB).
5. AIR 1972 Mad 247.
6. *Rameshchandra* v. *Smt. Premlata bai*, AIR 1979 MP 15 (DB).
7. *Rameshchandra Ray* v. *Smt. Nandinata Ray*, 1980 Hindu LR 205 : ILR (1978) 2 Cut 596.
8. *Gopal Krishna Sharma* v. *Dr. Mithlesh Kumari Sharma*, AIR 1979 All 316.

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husband even if the husband does not reside with them. The decree that can be passed is that the wife do render her marital obligations towards her husband and not that she should remain as a domestic servant with the parents of the husband.[1] Application by the husband for restitution of conjugal rights filed long after wife had left to petitioner and had even obtained order for maintain under Section 488, Cr. P. C. (Old)—Application is liable to be dismissed on the ground of delay.[2] Where the wife was being kept in illegal confinement by the husband, his petition under Section 9 would merit dismissal.[3] An unexplained cohabitation after knowldge of the alleged adultery, the other spouse can maintain petition for restitution for conjugal rights.[4] 'Cruelty' whether physical, legal or mental is good defence in petition, for restitution for conjugal rights. The conduct of husband or wife, subsequent to withdrawal by one from the society of other may at the most be relevant evidence to indicate their intentions or may be taken into consideration for appreciation of evidence led in proof of excuse or excuses advanced for said withdrawal but the same cannot be used to justify withdrawal.[5] Where the husband physically tortures his wife by burning her hand with boiling water and also mentally tortures her by filing false complaint, making serious allegations of her unchastity, the wife is fully justified in bidding good-bye to his hearth and home and seek asylum for her safety and security under the roof of her parents. In such case husband's claim for restitution of congujal rights is not justified.[6] Where the husband in his petition under Section 9 assailing wife's chastity and modesty and alleging that he took proceedings under Section 100 Cr. P. C. (Old) for search of his wife in house of P. and reiterating them in his statement on oath allegations amount to mental tortures to wife within the scope of the word 'Cruelty' and are bound to cause reasonable apprehension in mind of wife that it would be harmful for her to live with her husband. Allegations of faithlessness and loose sexual life of wife as made by husband do not fit in with his desire to live with her and decree for restitution of conjugal rights against wife, set aside.[7] Normally, a Hindu wife could not bid good-bye to her husband unless she is compelled by oppressive circumstances of intolerable cruelty on the part of her husband. Where a wife had been countenancing the persisting cruel treatment of the husband with patience and tolerance for long period of 8 or 9 years, there is no ground as to why without any rhyme, or reason she should leave her husband and be left in the lurch in this world by becoming a parasite either on her brother or father. Held on evidence that wife had withdrawn from the society of the husband for a just cause.[8] The question of mental cruelty should be decided in the light of norms of marital ties of the particular society to which the parties belong, there social values, status of the parties, environments of the parties, etc.[9]

8. Burden of proof and evidence.—In a petition for restitution of conjugal rights the onus is on the petitioners who can succeed only on the strength of

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1. AIR 1965 J & K 95 (DB).
2. AIR 1962 Punj 195.
3. AIR 1959 Punj 162.
4. 85 Mad LW 484 ; (1972) 2 Mad LJ 77.
5. AIR 1973 Punj 134 (DB).
6. AIR 1973 Punj 19.
7. (1972) 74 Punj LR 71.
8. 1971 Cur LJ 584.
9. *S. Bijoli Chaudhary* v. *Sukomal Chaudhary*, AIR 1979 Cal 87.

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his own case and not on the weakness of the defence set up.[1] The petitioner has to satisfy the Court that the other spouse had withdrawn from conjugal society without reasonable excuse.[2] The respondent can build an argument on the petitioner's admitted case.[3] The petitioner, however, cannot take advantage of the weakness of the other party.[4] Conduct subsequent to withdrawal from conjugal society cannot be used to justify the withdrawal.[5] Letters between the spouses should be understood in the background in which they are written and not to be construed as if they are precedents or statute.[6] If the petitioner proves withdrawal from conjugal society by the respondent the latter must show reasonable excuse for such withdrawal.[7] Husband's petition for restitution of conjugal rights wherein onus or proof is on the petitioner and not respondent. Petitioner can not succeeded merely because wife's defences had not been established.[8] In a petition for restitution, the respondent wife challenged validity of marriage it is for petitioner to prove validity of a marriage.[9] Failure to file certified copy of the extract from marriage register with application cannot be concluded as to the absence of valid marriage. As the purpose of registration is only to facilitate proof of marriage and validity of marriage does not depend on the registration even and omission to the register the marriage cannot lead to such conclusion.[10] In a petition for restitution under Section 9 by the husband, the wife admitted withdrawal of society from her husband. It is for the wife to prove in answer the reasonable excuse for withdrawal from the society of the husband which need not quite come up to the requirements of Section 9 (2).[11] It is no doubt true, that when acts of violence are committed by husband in his own house, against the wife, it may be difficult for the wife to get eye witnesses to such acts. But, such difficulty would not, by itself, be a good reason for the court to discard the usual rule of prudence of seeking some corroborations for the evidence given by the wife in respect of the alleged acts of violence.[12] It is undoubtedly true that the legal concepts of cruelty cannot be static, but should be one which ought to keep pace with progress in civilisation and advancement in social conditions. Courts should, nevertheless, be careful not to extend the area of legal cruelty so as to imperil the very institution of marriage itself. Proof of actual physical violence may no longer be necessary to convince the court of cruelty. If the husband demanded monies from wife's father that the husband's parents refused to receive parcel of sweets sent by the wife's parents,

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1. *Rebarxi* v. *Ashit*, AIR 1965 Cal 162; *Om Pati* v. Kartar Singh, AIR 1971 P & H 35; *Ratnaprabha* v. *Seshrao*, AIR 1972 Bom 182 : 74 Bom LR 434.
2. *Kaushaliya* v. *Lal Chand*, AIR 1972 Raj 253.
3. *Sushil Kumari* v. *Prem Kumar*, AIR 1976 Delhi 32.
4. *Sadhu Singh* v. *Jagdish Kaur*, AIR 1969 Punj 189; *Gurdev Kaur* v. *Sarwan Singh*, AIR 1959 Punj 162; *Mango* v. *Premchand*, AIR 1962 All 447; *Kanna* v. *Krishnaswami*, AIR 1972 Mad 247.
5. *Surinder Kaur* v. *Gurdeep Singh*, AIR 1973 P & H 134.
6. *Manjula* v. *Zaverila*, AIR 1975 Guj 158.
7. *Ibid.*
8. AIR 1965 Cal 62 (DB).
9. AIR 1966 MP 166 (DB).
10. ILR (1963) MP 917 : 1964 MPLJ 147.
11. AIR 1963 MP 10 (DB).
12. 40 Mys LJ 784 (DB).

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with very unkind word, and the fact that the husband did not at all reply to the wife's letter written by her from her brother's house until the wife had to send a lawyer's notice. It would be exaggeration to say that this conduct on the part of the husband and his father could have resulted in such mental torture to the wife as would justify the court concluding that legal cruelty had been established.[1] In a proceeding under Section 9 when the validity of marriage is challenged even though performed with *Vedic Rites*, there must be proof of *panigrahan* the *Saptapadi* ceremonies and no presumption that essential ceremonies were performed can be drawn.[2] In the absence of evidence of valid marriage, no presumption regarding its validity can be raised, Such presumption can be raised only where it is established that the marriage was duly solemnized but some unessential ceremonies were not performed or there was some defect in the completion of the ceremonies.[3] In a petition under Section 9 the defence of maltreatment has been alleged by the wife the burden is on respondent wife to prove it.[4] Failure on the part of wife to prove "just cause" for staying away from husband and also cruelty towards her by the husband would entitled the husband to a decree for restitution.[5] In a case where after five years of separation the husband files an application for restitution of conjugal rights. It is not safe to deny the relief on the basis of the sole and uncorroborated evidence of the wife in support of her allegations that the husband had made accusation against her chastity that he had been impotent and that there had been cruelty, it being not impossible for the wife to produce some evidence in that respect. In general corroborations of her own evidence.[6] The wife left her husband and never returned to him, even in court the respondent husband had tried to get her back. Even through Panchayat but failed. The wife also failed to prove that she was maltreated and driven out of his house. On the other hand the husband had proved that the wife had withdrawn herself from his society without any reasonable cause and simply because he could not give any reason as to why his wife left him, it would not disentitle him to his rights under Section 9.[7] In a proceeding under Section 9 by the husband the onus lies on husband to prove allegations and defence of wife will not be sufficient to entitle the husband to obtain relief.[8] Where a respondent first pleaded that he had taken a divorce and subsequently pleaded that the petitioner was not legally married to him, the burden is on the respondent to prove that there was no valid marriage.[9] The initial burden to prove the allegation on the basis of which a decree for restitution is sought on the petitioner who comes to the court.[10] However, the burden of proof when both the parties have laid evidence pales into insignificance.[11] In order to avoid monthly payment of maintenance order secured under Section 488, Cr. P. C. (Old) by the wife and the husband filed petition for restitution of conjugal rights when wife had

1. (1962) 40 Mys LJ 784 (DB).
2. AIR 1963 Punj 235.
3. AIR 1966 HP 20.
4. AIR 1970 MP 36.
5. AIR 1967 MP 204.
6. AIR 1967 Mys 165.
7. (1967) 69 Punj LR 603.
8. (1966) 68 Punj LR 713.
9. ILR (1971) AP 163.
10. AIR 1972 Bom 182 : 1972 Mah LJ 159.
11. AIR 1975 Gui 158.

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become blind and too old to perform conjugal rights, it was held that husband was guilty of legal cruelty to his wife and failed to establish that wife had withdrawn from his society without reasonable excuse.[1] When the husband is willing to keep the wife in his house, the burden lies on wife to prove that there were valid grounds for her withdrawal from her husband's company.[2] Petition for restitution of conjugal rights can not be refused if it shown that respondent has reasonable excuse for withdrawing from the society of the petitioner.[3] The Explanation added to Section 9 (1) by Act LXVIII of 1976 has clearly provided for a rule of evidence by laying down the burden of proof in regard to a question whether there has been a reasonable cause for the withdrawal from the society of the petitioning spouse on the party pleading such excuse. The Explanation has not altered the scope and ambit of sub-section (1) before its amendment.[4] The *Explanation* is retrospective in operation.[5]

9. Form of the Decree and mode of execution.—Though the object of a decree for restitution of conjugal rights is the same whether the petitioner is the wife or the husband. Thus if the husband is the petitioner the form is that the wife do return and live with this husband and render him conjugal rights and if the wife is petitioner the form is that the respondent do take the petitioner home and receive her as his wife and render her conjugal rights. When the wife has obtained decree for restitution of conjugal rights but the husband not showing any inclination to obey decree. The entire obligation rested with husband to make all efforts to obey the decree of restitution of conjugal rights even if wife applied for maintenance after 55 days and it would mean that wife is unwilling to join husband.[6] Though a decree for restitution of conjugal rights may be passed against a wife it is not nowadays enforced by the courts. Non compliance with a decree will be a good answer to an application under Cr. P. C. for maintenance.[7]

In case the husband had failed to comply with an order for costs and interim maintenance and while in default he applied for stay of the petition the court would not grant stay where reason for such failure was not satisfactory.[8]

A passing of any decree does not include dismissal of the petition for restitution of conjugal rights and subsequent order for alimony under Section 25 is not valid.[9] The restitution of conjugal rights decree was appealed to the High Court instead of before District Judge and no objection was raised to its jurisdiction. The decree rendered in appeal cannot be held to be a nullity.[10] The husband's petition for restitution of conjugal rights under

1. 1975 Hindu LR 446 (Punj).
2. 1972 CURLJ 751 : (1972) 4 Punj LR 961.
3. *Ghamshymanlal* v. *Kanti Devi*, 1979 Hindu LR 603 (Delhi).
4. See *Krishnamurthy* v. *Shyamnathakumari*, (1966) 2 Kant LJ 361.
5. *Gurubaz Singh* v. *Smt. Bhira Kaur*, 1979 Hindu LR 185 (Punj).
6. *Shantabai Prabhakar Kothale* v. *Prabhakar Atmaram Kothale*, 1976 Mh LJ 453.
7. *Mehta* v. *Ayemaung*, AIR 1931 Rang 118.
8. *Leavis* v. *Leavis*, AIR 1921 PC 399 ; *Gindan* v. *Barelal*, AIR 1976 MP 83.
9. AIR 1961 Guj 202 (DB).
10. *Rabindranath* v. *Smt. Pramila Bala*, 47 Cut LT 182 : AIR 1979 Ori 85 (DB).

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Section 9 and wife's petition for judicial separation under Section 10 were dismissed by common judgment and decrees in both proceedings are separate and the husband not having appealed from dismissal of his petition is barred by *res judicata* in getting a decree in his favour in wife's appeal against the dismissal of her petition for judicial separation.[1] A suit under Section 9 was decreed *ex parte* in favour of husband. The suit for the same cause by wife was filed subsequently and husband pleading *res judicata* in amendment application filed after framing of issues. It was held that the suit was barred under Section 11 of C. P. C.[2] The recording of satisfaction of decree on the basis of statements of parties in court that they were willing to live together does not tantamount to restitution of conjugal rights. There must be resumption of conjugal duties in fact.[3] Where pending appeal from the decree for restitution of conjugal rights the sole respondent dies right to prosecute appeal does not survive.[4] The dismissal of husband's petition for dissolution of marriage was dismissed as the husband failed to pay the interim maintenance ordered under Section 24 was held illegal.[5]

The judgment by competent court exercising matrimonial jurisdiction is judgment *in rem*.[6]

The non-payment of interim maintenance directed by the court during appeal would not fall within the ambit of 'cruelty' so as to set aside the decree for restitution of conjugal rights. Even so, it cannot be held that the wife has reasonable excuse to withdraw from the society of the husband.[7]

A decree obtained by husband for restitution of conjugal rights remaining unsatisfied, the husband filed a petition for divorce, wherein the wife admitted non-compliance of the decree for more than two years but took a plea that the husband entered into another marriage. The trial court held that the factum of second marriage was not proved and accepted the petition and a decree for divorce was passed. In appeal by wife a single judge of the High Court reversed the finding and dismissed the petition for divorce. The husband then filed Letter's Patent appeal, wherein it was held that finding of fact arrived at by the single Judge was wrong and hence it was liable to be set aside for want of pleadings as to the form of marriage and custom and evidence thereon.[8]

Where the wife alone has a job which is also a good job and the husband does not have sufficient income. It cannot be said that the husband has a right to decide that matrimonial home must be at the place where he happens to reside and the wife must resign her job and come to live with him there. It would be difficult to say now that there is any custom which obliges an earning wife to resign the job and join the husband even though on merits it is she who is better placed to choose the place of matrimonial home rather than husband.[9]

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1. AIR 1965 All 280.
2. *Nand Kishore Kapoor* v. *Smt. Shanti Kapoor*, AIR 1982 All 138.
3. *Smt. Harbhagan Kaur* v. *Lt. Col. Bhagwant Singh*, AIR 1982 P & H 200.
4. AIR 1971 Bom 183.
5. 1975 Andh LT 312 (DB).
6. AIR 1971 Bom 183.
7. *Gingan* v. *Barelal*, AIR 1976 MP 83.
8. *Atma Ram* v. *Smt. Kalawati*, AIR 1982 P & H 83 (FB).
9. *Mrs. Swaraj Garg* v. *Shri K. M. Garg*, AIR 1978 Delhi 296.

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Where the earlier decree passed for restitution of conjugal rights by the husband is in force, petition by wife for the same relief contending that husband should come and stay with her at the place of her service away from the husband is not maintainable.[1]

Where delay in filing petition under Section 9 is caused because of efforts made to secure society of other spouse, relief cannot be refused on the ground of delay.[2] The dismissal of earlier petition for non-payment of litigation expenses does not bar subsequent petition.[3]

Withdrawal of a petition by the wife for restitution of conjugal rights bars a second petition based on the same cause of action.[4]

10. Decree and subsequent separation.—Where the decree for restitution of conjugal rights has been satisfied by the parties coming together and living as husband and wife, the fact that subsequently one of the spouses has withdrawn his or her company from the other without reasonable excuses is no ground for executing the former decree which had been satisfied but the remedy is to institute another suit for restitution of conjugal rights.

11. Effect of decree.—In view of the special jurisdiction conferred on the special Court under the Act and in view of the judgment rendered by it being a judgment *in rem* any prayer for a decision on the right to get maintenance in an ordinary civil Court will have no effect in the face of the decision rendered by the Court under the Act and the special Court can restrain the proceedings in the Civil Court.[5] Where a decree has been granted in favour of wife for restitution of conjugal rights, the Court can grant permanent alimony to her under Section 25 without filing a suit for maintenance under the Hindu Adoptions and Maintenance Act.[6] Where on a decree for restitution of conjugal rights being passed the respondent returned to the petitioner's house but subsequently again deserted the petitioner, the latter can file a second petition for restitution of conjugal rights. The second petition will not be barred as the second withdrawal from the cohabitation gives rise to a fresh cause of action.[7] The policy of the law is not to encourage utilisation of a decree for restitution of conjugal rights for *mala fide* purposes. The Court cannot be used as a place to which a party to a marriage could come whenever it suited him or her having meanwhile held the weapon of redress over the head of the other spouse.[8] A right to obtain a decree for restitution of conjugal rights can be referred to arbitration under Section 21 of Arbitration Act through Court.[9] Where the marriage itself was brought about by fraudulent misrepresentation by the husband that he was bachelor he was not entitled to the relief sought by him.[10] In a suit by husband for restitution of conjugal rights the fact that the wife knew at the time of her marriage about the existence of first wife

1. AIR 1975 AP 239.
2. AIR 1973 Punj 134 (DB).
3. AIR 1973 Punj 138.
4. AIR 1973 Raj 94.
5. *Dr. H. T. Veera Reddi* v. *Kistamma*, (1975) 1 MLJ 300.
6. *Seetharam* v. *Phooli*, AIR 1972 Raj 313.
7. *Keshavlal* v. *Bai Parvatibai*, ILR 18 Bom 327.
8. *Jasmel Singh* v. *Gurnam Kaur*, AIR 1975 P & H 225.
9. *Vikram Singh* v. *Vidya Devi*, 1975 All LJ 406.
10. *Rukmani* v. *T. S. R. Chari*, AIR 1935 Mad 616.

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would not prevent the availability of statutory defence.[1] Whenever the petitioner comes into Court with a prayer for the restitution, it is legitimate for the Court to expect an answer to the question as to why the respondent has deserted the petitioner. Mere bald statement by the petitioner that the respondent has left the petitioner is not going to satisfy anybody. No one does a thing without cause. Matrimonial law ought not to be made the pawn for selfish gains unconnected with matrimonial home in the hands of one spouse to the detriment of the other.

Decree for restitution of conjugal rights—Husband not complying with the decree and ill-treated her—Husband not entitled to the relief under Section 13 (1-*A*).—Where a decree for restitution of conjugal rights was obtained by the wife under Section 9 on the ground that the husband had without reasonable cause withdrawn from her Society. A decree for restitution of conjugal rights was granted to the wife. After the decree, the husband not only, not complied with the decree, but did positive acts by ill-treating her and finally drove her away from the house. It was not a case of mere non-compliance of the decree, but fresh positive acts of wrong. Held that the husband was not entitled to the relief under Section 13 (1-A) of the Act.[2]

Decree for restitution of conjugal rights.—Where the husband has not proved that the wife has deserted him, whereas on the other hand, without reasonable excuse the husband had withdrawn from her company and she was entitled to a decree under Section 9 of the Act.[3]

Divorce—Consent decree—Restitution of conjugal rights.—If a consent decree for restitution of conjugal rights under Section 9 was passed, it would not be a nullity. If it was not challenged in appeal or by way of other remedy available under the law and becomes final, it could not be ignored and could form the basis of divorce proceedings under Section 13.[4]

Restitution of conjugal rights by husband—Alimony claimed by wife—Withdrawal of restitution petition—Grant of maintenance.—In a proceeding filed under the Act for divorce or judicial separation or restitution of conjugal rights the respondent in addition to opposing the claim made by the petitioner is entitled to make a counter-claim for any relief under the Act on the ground of petitioner's adultery, cruelty or desertion. Now the relief claimed by the wife is permanent alimony for herself and for the minor child. This claim falls under Section 25 of the Hindu Marriage Act. Section 23-A of the Act clearly provides that in a proceeding for divorce, judicial separation or restitution of conjugal rights, the wife can make a counter-claim for any relief under the Act on the ground of the petitioner's adultery, cruelty or desertion.[5]

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1. *Mst. Deepo* v. *Kehar Singh*, AIR 1962 Punj 183.
2. *Geeta Lakshmi* v. *G. V. R. K. Sarveswara Rao*, AIR 1983 AP 111 at p. 114.
3. *Smt. Sandhya Bhattacharjee* v. *Gopinath Bhattacharjee*, AIR 1983 Cal 161 at p. 165.
4. *Sudarshan Kumar Chadha* v. *Smt. Saroj Rani*, AIR 1983 Punj 59 at p. 61.
5. *C. Sannaiah* v. *Smt. Padma*, AIR 1983 Kant 114 at p. 115 : (1982) 2 Kant LJ 41 : (1982) 2 DMC 121.

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10. Judicial separation.—[1][(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall, no longer, be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

SYNOPSIS

1. Judicial separation—Meaning of.
2. Scope and applicability.
3. Contract opposed to public policy.
4. Cruelty and desertion.
5. Cruelty.
6. Adultery.
7. Decree and appeal.
8. Section 10 and other enactments.
9. Evidence and burden of proof.
10. Constructive desertion.
11. Court—Forum, jurisdiction and duty of.
12. Pleadings and procedure.
13. Maintenance.

1. Judicial separation—Meaning of.—Judicial separation means separation from bed and board and the spouse continue to be husband and wife to each other. It does not mean termination of the marriage. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed by the decree are substituted therefor.

2. Scope and applicability.—Sections 5, 9, 10 and 13 and other provisions of Hindu Marriage Act are protected under Article 25 (2 (b) of the Constitution.[2] The main function of the matrimonial reliefs is to offer protection to the innocent parties and letting a marriage dissolved when it has for all practical purposes broken down so that its formal continuance without it's essential attribute may not appear a blot on the institution of marriage.[3] Petition for injunction restraining husband from taking a second wife is not maintainable.[4] Section 29 (2) of the Hindu Marriage Act states that, nothing

1. Sub-section (1) of Section 10 substituted by the Marriage Laws (Amendment) Act, 1976, Section 4.
2. AIR 1957 All 411.
3. (1969) 2 Mys LJ 1.
4. *Umashankar Prasad Singh* v. *Smt. Radha Devi*, AIR 1967 Pat 220.

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contended in the Act shall be deemed to affect any right recognised by the custom or conferred by any special enactment to obtain the dissolution of the Hindu Marriage, whether solemnised before or after the commencement of the Act. In the matter of divorce according to custom it is not necessary for the parties to obtain sanction of the Court in order that the divorce or dissolution may be rendered valid.[1]

The material language of the provision should be borne in mind in matrimonial offences.[2] The irritating idosyncrasies of the wife rendering husband's life unhappy is not a ground for granting a decree for judicial separation.[3] If the husband has contracted second marriage the first wife will be entitled only for judicial separation and the second marriage is not voidable at the instance of first wife.[4] The right to live separately from the husband given to a wife, under Section 18(2) (d) of the Act 78 of 1956 is not and cannot be the same as a right of judicial separation under Section 10 of Hindu Marriage Act. If the husband abandons the other wife, he could certainly call upon his previously separated wife to live with him. To respond to such request will be a duty which she owes to him as her husband.[5] The wife if not unchaste nor her conduct fragmantly vicious, the order for alimony in wife's favour should not be interfered with, even if wife deserts the husband he will be granted a decree for judicial separation.[6] The judicial separation does not end marital relationship but decree of divorce under Section 13 is necessary.[7] If the spouse living at the time of the marriage, remarriage within one year of dissolution of earlier marriage under Section 30 of the Special Marriage Act, then application for judicial separation is not maintainable.[8] An order for judicial separation under Section 10 on any ground that is mentioned in Section 10 (1)(f) does not put to an end to the marriage. The relationship of husband and wife is still subsisting and the effect of an order under Section 10 is only to permit the parties to the marriage to live apart and it shall no longer be obligatory for either parties to cohabit with other. An order for judicial separation affords an opportunity to reconcile their differences and come together. If there is no reconciliation the parties are enable under Section 13 (I-A) to get an order dissolving the marriage. Whatever may be the impact of the order of dissolution under Section 13 (1)(i) or Section 25 it cannot be contended that because of an order for judicial separation based on Section 10 (1)(t) the jurisdiction of a Court who is to exercise it's discretion under Section 25 is taken away.[9] Once desertion is established there is no obligation on the deserted husband to appeal to the deserting spouse to change her mind and the circumstances that the deserted husband makes no efforts to take steps to effect a reconciliation with the wife does not debar him from

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1. (1963) Mad LJ (Cr) 212 : 1964 (1) Cr LJ 237 (AP).
2. AIR 1960 Bom 418 (DB).
3. AIR 1964 MP 28 (DB).
4. AIR 1959 MP 400.
5. *A. Annamalai Mudaliar* v. *Perumayya Ammal and others*, AIR 1965 Mad 139 (DB).
6. ILR (1964) 2 Punj 732.
7. *N. Narasimha Reddi and others* v. *M. Boosamma*, AIR 1976 AP 77.
8. *Biswanath Mitra* v. *Smt. Anjali Mitra*, AIR 1975 Cal 45 (DB).
9. *Kaithakulangaru Kunhikanann* v. *Neelatham Vettil Malu*, AIR 1973 Ker 273 (DB).

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obtaining the relief of judicial separation.[1] Two distinct matters have to co-exist in order that desertion might come to an end. First there must be conduct on the part of the deserted spouse which afford just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. There is one another matter which is of the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. If no case of desertion by wife for continuous period of not less than 2 years prior to the date of petition for divorce, the petitioner was held not entitled to decree for judicial separation.[2] Where judicial separation is being claimed on the ground of Section 10 (1) (f), the fact that the husband cohabited with the wife even after the knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condonation.[3] In *Dr. N. G. Dastane* v. *Mrs. S. Dastane*,[4] it has been held that the proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trial involving inquiry into issues of a qausi-criminal nature. A criminal trial involves the liberty of a subject which may not be taken away on a mere preponderance of probabilities. Neither Section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the Court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the Court the power to pass a decree if it is "satisfied" on matters mentioned in clauses (a) to (e) of the section. Considering that, proceeding under the Act are essentially of a civil nature, the word "satisfied" must mean "satisfied on a preponderance of probabilities and not, "satisfied beyond a reasonable doubt". Section 23 does not alter the standard of proof in civil cases.[5] Ordinarily the subsequent marriage of the husband would have furnished a just cause to the wife to desist from making any attempt at reconciliation or resuming cohabitation but this is subject to a very important condition, namely, that the second marriage should have had such an impact on the mind of the wife so as to cause her to continue to live apart and continue the desertion. If the conduct of the husband has had no such effect on her mind, it cannot be said that the desertion on her part terminated by reason of the conduct of the husband. The findings of the Court including the High Court is that the subsequent marriage of the husband did not have any such impart on the mind of the wife as is contemplated by law.

This finding together with the other finding would conclude the matter because it is quite clear that within the meaning of the Explanation to Section 10 (1) (a) the desertion by the wife had been proved without reasonable cause and without the consent or against the wish of the husband.[6]

3. **Contract opposed to public policy.**—There were disputes and differences between the spouses and the wife filed a suit for judicial separation

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1. *Lachman Uttamchand Kripalani* v. *Meena*, AIR 1964 SC 40 : 66 BLR 297.
2. *Kistamma* v. *Dr. H. P. Reddy*, (1970) 1 SCWR 645 : 1970 SCD 463.
3. *Smt. Chandra Mohini* v. *Avinath Prasad*, AIR 1967 SC 581 : 1967 All LJ 167 : 1967 SCD 584.
4. AIR 1975 SC 1534.
5. AIR 1970 Bom 312 reversed.
6. *Smt. Rohinikumari* v. *Narendra Singh*, (1972) 1 SCWR 559.

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against husband. During the pendency of the suit the husband wrote a letter to her agreeing to pay her a sum every month as maintenance to her and to her children. He agreed to give money to her daughter's marriage expenses. He also agreed to give some percentage of bonus received by him. These amounts were liable to variation depending on his income. The wife replied on the same day informing him that she would withdraw all allegations and charges made by her in the plaint and that she would file a petition for dismissal of the suit. She filed petition for dismissal of the suit and it was dismissed for non-prosecution without cost. The husband paid amount for a short period but stopped sending amount afterwards. The wife issued notice and subsequently filed suit for declaration that the letter-agreement was binding on him and for arrears. The husband resisted the same as it is opposed to public policy and void and that the letter was only offer. It was held that the estrangement between the parties was final and binding and not opposed to public policy.[1]

4. Cruelty and Desertion.—For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there : (1) the factum of separation and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserting spouses are concerned : (1) The absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving a matrimonial home to form the necessary intention. Two distinct matter have to co-exist in order that desertion might come to an end. First, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial house. There is one other matter which is that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that it cause her to continue to live apart and thus continue desertion. The burden of proving desertion is on the petitioner and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause.[2] If the wife can claim maintenance on the ground of the husband having taken a second wife it cannot be posited that she deserted her husband without reasonable cause within the ambit of Section 10 (a) of the Act. The husband's second marriage enabling his first wife to live separately from her husband without forfeiting her claim to maintenance. The husband had no right to claim judicial separation on the basis of such grounds.[3] *Animus deserendi* cannot be prior to the factum of separation. *Animus deserendi* may co-exist with the factum of separation or it may be subsequent to the factum of separation.[4] If a husband makes serious allegation of unchastity against his wife and the allegations are unfounded and if the wife in consequence of such allegation refuses to cohabit with the husband and goes away from him the wife has "grave and weighty" reasons for living apart from the husband after he levelled those serious and unfounded allegations against her character,

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1. *Smt. Sandhya Chatterjee* v. *Sali Chandra Chatterjee*, AIR 1980 Cal 244.
2. *Lachman Uttamchand Kripalani* v. *Meena*, AIR 1964 SC 40 : 1966 BLR 297.
3. AIR 1963 AP 323 (DB).
4. 61 BLR 1549 : AIR 1950 Bom 418 (DB) ; reversed on another point in AIR 1964 SC 40.

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and in such a case she cannot be held to have committed the offence of desertion.[1] There is no judicial definition of desertion that can be applied to meet the facts of every case, for the facts which constitutes desertion vary with the circumstances and mode of life of the married person. Desertion is in it's essence the abandonment of the one by the other with the intention of forsaking him or her for all the time.[2] In deciding the question of desertion, the Court had to look to the conduct of both the parties and the question as to which spouse was staying away from it or staying in the matrimonial house is immaterial. Further, even if the wife is guilty of desertion her offer to come back and live as faithful wife without repeating any conduct which might incur the husband's displeasure was a complete answer to the allegation of desertion. Hence the husband could not refuse reinstatement and as such no decree for judicial separation can be granted against her.[3]

Cruelty and desertion were the grounds provided for judicial separation under the Act as it stood prior to the Act No. 68 of 1976. Now by amendment, cruelty and desertion apart from being the grounds for judicial separation have also been made grounds for divorce under Section 13. It is one of the principles and essential obligation on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. The married life without a sexual life will be a curse to the wife. Thus failure to or inability to, or refusal to effectuate the sexual intercourse by the husband without any reason on the part of the wife, would amount to cruelty. It may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a cause of annoyance or indignity amounts to legal cruelty. False accusations would also amount to cruelty as the same will lead to mental torture. Desertion is not from a place but from the state of things.[4]

Cruelty to husband.—Wife refusing to live with husband in his family because two persons in the family were suffering from T. B. and she has no objection to live with the husband in separate house, it was held that her conduct could not be construed as cruelty within the meaning of Section 10 or as desertion within the meaning of *Explanation.*[5] A Hindu wife who wants to be economically independent and, therefore wants to carry on a profession, would be deeply just and can be reasonably expected to have an apprehension that it would be dangerous to live with a husband who is taunting her or being independent and telling her every now and then that she was having extra marital relations with her professional colleagues and called her a prostitute. There cannot be worse insult and cruelty to an educated Indian wife. Such allegations of husband must be held to be 'cruelty by itself' even the Court has power to grant injunction restraining husband from entering matrimonial home.[6] The very act of levelling allegations such as adultery, tantamounts to perpetrating "mental cruelty" on other party.[7] If the husband drives away his wife from his house and the wife staying in her parent's house cannot be

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1. 61 BLR 1549 : AIR 1960 Bom 418 (DB).
2. 1959 Nag LJ (Notes) 76.
3. AIR 1964 MP 28 (DB .
4. *Dr. Shrikant Rangacharya Adya* v. *Smt. Anuradha,* AIR 1980 Kant 8 (DB).
5. *Sunil Kumar Roy* v. *Smt. Swarn Datta Roy,* AIR 1982 Gau 36 (DB).
6. *Shanta Wadhwa* v. *Purushottam Wadhwa,* 1977 Mah LJ 661 (DB).
7. *Mohinder Kaur* v. *Bhagram,* AIR 1979 Punj 71 ; *Madan Mohan Kohli* v. *Smt. Sarla Kohli,* AIR 1967 Punj 397 ; AIR 1963 Punj. 242.

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called desertion on the part of the wife.[1] The desertion means intentional permanent abandonment of one spouse by the other without other's consent and without reasonable cause.[2] Deserting spouse has *locus paenitentiae* and can purge consequence of desertion the offering to live with the deserted spouse. If the wife is living separately in a room provided by husband under compromise in proceeding under Section 488 Cr. P. C. (old) and the husband is having another wife living with him in his house, the separate residence of the wife is not without reasonable cause or consent and does not amount to desertion.[3] Refusal by wife to live with husband who has another wife living, she is not deserter.[4] The unsoundness of mind for relevant period of two or three years is sufficient. For divorce such unsoundness of mind is to be proved to be incurable.[5] If a spouse abandons the other spouse in the state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.[6] Mere desertion does not constitute matrimonial offence, because the desertion must be accompanied by intention to bring cohabitation to end permanently. If there is no evidence to show such an intention, the decree for judicial separation cannot be granted.[7] A separation, however long continued, with the consent or acquiescence of the parties can never constitute desertion. In order to constitution desertion it is necessary that the separation be shown to be against the will and without the consent of the complaining spouse. It may even be said that if a spouse, not entirely blameless for the act, makes no effort to prevent desertion by the other and acquiesces in, and appears satisfied with, its continuance, he or she will not be entitled to separation on the ground of desertion. If the wife is persistently insulted without any reasonable cause by the relations of the husband and the husband, instead of giving her necessary protection, joins the relations, in such activities, the wife may in such circumstances be justified in saying that she will not live under his roof.[8] The claim of the husband can only be defeated if he be guilty of constructive desertion which can be proved by his own conduct in compelling his wife to take the course which she adopted. The payment of maintenance allowance can not in law, put an end to desertion which remains 'continuing' because the agreement to make this payment does not be the parties to live separately.[9] The fact that the husband cohabited with his wife even after the knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condonation.[10] In cases where the consideration of remarriage of the husband failed to have any impact on the mind of the wife, remarriage of the husband would not afford reasonable cause for desertion.[11] Where the husband himself takes his wife to her mother's place for confinement that is not leaving the matrimonial home with the intention of

1. (1965) 1 Mad LJ 149.
2. (1965) 1 Mys LJ 294 (DB).
3. AIR 1961 Punj 181.
4. AIR 1970 Mys 59 : (1969) 2 Mys LJ 332.
5. *Ajit Rai Sheo Prasad Mehta* v. *Bai Vasumati*, AIR 1969 Guj 48 : 10 Guj LR 253.
6. 66 BLR 297.
7. AIR 1957 SC 176 ; 1962 MPLJ (Notes) 278.
8. 1965 Punj LR 332.
9. AIR 1960 Punj 328.
10. *Smt. Chandra Mohini* v. *Avinash Prasad*, AIR 1967 SC 581 ; see also 1967 All LJ 167.
11. AIR 1970 All 102.

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deserting the husband.[1] In a suit by husband for judicial separation, for alleged desertion of marital home by wife without just or reasonable cause, the wife alleged that her father-in-law misbehaved and tried to poison her but she could not prove the allegations and offered to live with the husband provided he lives separately from his parents, is an unreasonable condition made not in good faith. It was held that the husband is entitled for the decree for judicial separation.[2] Where the husband had tried his best to keep his wife with him even at the cost of leaving his mother and other family members and began to reside in a different street in a rented house. If he could not find happiness even there and decided to revise his decision and go back to his parental house, it could not be said that he acted in arbitrary or unreasonable manner. He tried to pursuade his wife to fall in line with his way of thinking to which she did not responded. It was held that the husband is entitled to a decree for judicial separation.[3] Where the husband completely neglects in spite of the wife's repeated pleadings and urging to receive her on any terms he is guilty of desertion and the strain of wilful separation for years and the complete denial of coitus would also amount to causing such mental cruel as would entitle the wife to judicial separation.[4] The separation of the spouses and an *animus deserendi* co-existing at some point of time must be proved.[5] The *animus deserendi* at the time leaving also must be proved.[6] Mere apprehension in the mind of the wife that her husband wanted to marry for the second time is no ground to leave the matrimonial home.[7] Where the husband has created circumstances as not to let his spouse live with him and in writing informed her that he does not want to accept her as she is a woman of bad character, it cannot be said that the wife deserted him.[8] Where the wife went with her father with the consent of her husband under compelling circumstances created by husband and the husband never tried to bring her back and the wife not coming back is not desertion.[9] If the wife was living separately with the consent of husband in terms of agreement executed by and between them, then desertion alleged by husband cannot be held to be proved.[10] The allegation by wife of illicit relationship between the husband and his Bhabhi (sister-in-law) in written statement must be deemed to have been condoned by subsequent cohabitation between the husband and wife.[11] The husband himself leaving wife at her parent's house—Parents not wanting her and persuading her to live in matrimonial home despite harsh attitude of husband—Wife herself keen on making her home even though husband charged her with incest and left her with her parents—Held that there was no desertion.[12]

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1. *Bejoy Daw* v. *Smt. Aloka Daw*, AIR 1969 Cal 477 (DB).
2. *Krishna Bai* v. *Punam Chand*, AIR 1967 MP 200.
3. (1967) 69 Pun LR 566.
4. AIR 1976 Delhi 46 (DB).
5. *Chakradhar Mohanty* v. *Kumudni Dei*, AIR 1972 Orissa 64.
6. *Rajrani* v. *Harbans Singh Chhabra*, AIR 1972 Pat. 392.
7. (1975) 77 Pun LR 129.
8. 1975 WLN (UC) 131 (Raj).
9. 1975 WLN (UC) 125 (Raj).
10. *Aryasomayajula Venkata Subba Rao* v. *Aryasomayajula Surya Kumari*, AIR 1980 AP 318 (DB).
11. *Sadan Singh* v. *Smt. Resham*, AIR 1982 All 52.
12. *Smt. Pushpa Rani* v. *Krishnan Lal*, AIR 1982 Delhi 10.

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5. **Cruelty.**—The concept of cruelty has varied from time to time, from place to place and from individual to individual, in its application, according to the social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel is to be determined from the whole facts and the matrimonial relations between the parties. In this connection the culture, temperament and status in life and many other things are the factors which have to be considered for judging the conduct complained of in relation to the fact as to whether it amounts to the matrimonial offence of cruelty within the meaning of Section 10 (1) (b) of the Act.[1] The husband accusing his newly wedded wife of unchastity and driving her out—Her parents sending her again to husband's house—Wife attempting to commit suicide—In written statement wife making allegations that her husband administered the poison. The wife's allegation considered in the context of the circumstances did not constitute an act of cruelty.[2] In husband's petition for judicial separation the wife alleged to suffer from incurable disease of nose emitting foul smell as being harmful and injurious to husband's health. In cases of diseases other than those contained in Section 13 further requires is to establish that cruelty as envisaged under sub-clause (b) of sub-section (1) of Section 10 of the Act has resulted in. The aspect of intention may become 'important and crucial' in such cases. If the act complained of is not proved, the petition must fail.[3] The cruelty may be of infinite variety and the test to determine legal cruelty in matrimonial law has been stated in *Dr. Narayan Dastane* v. *Mrs. Sucheta Dastane*.[4] Harm or injury to health, reputation, the working career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. Plainly, what must be determined is not whether the petitioner has proved the charge of cruelty having regard to the principles of English Law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious for him to live with the respondent. The question whether the misconduct complained of constitute cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial Court. The only rider is the interdict of Section 23 (1) (a) of the Act that the relief prayed for can be decreed only if the Court is satisfied that the petitioner is not in any way taking advantage of his own wrong. Not otherwise acts like tearing of the *Mangal-Sutra*, locking out the house when the husband is due to return from the office, rubbing chillies powder on the tongue of an infant child, beating a child mercilessly while in high fever and switching on the light at night and sitting by the bedside of the husband merely to nag him; are acts which tend to distroy the legitimate ends and objects of matrimony. The relevant consideration is to see whether the conduct is such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for him to live with the respondent. The threat that she will put an end to her own life or that she will set the house on fire, the threat that she will make lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the appellant and his parents

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1. *Jia Lal Adrol* v. *Sarala Devi*, AIR 1978 J & K 69 (FB).
2. *Smt. Gurbachan Kaur* v. *Sardar Swaran Singh*, AIR 1978 All 255.
3. *Jia Lal Abrol* v. *Sarla Devi*, AIR 1978 J&K 69 (FB).
4. 1969 Mh. LJ 798 : AIR 1970 Bom 80 : 71 BLR 569.

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are all of so grave an order as to imperil the appellant's sense of personal safety, mental happiness, job satisfaction and reputation.[1]

If the wife is suffering from epilepsy it may cause mental pain to the husband but it cannot be said that it causes reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to live with her and he cannot be said to be treated with cruelty.[2] In a petition for judicial separation on the ground of cruelty, the defence of insanity is not available to defendant. It is necessary to attribute *mens rea* to the spouse.[3]

That act of wife voluntarily depriving husband of her society and cohabitation for a long period, amounts to mental and moral cruelty to husband.[4] Cruelty need not be physical violence administered by defaulting party but cruelty may be in conduct, demeanour and treatment by defaulting party. False charge unchastity against wife is legal cruelty.[5] The reasonable apprehension in the mind of the wife need not be merely of physical injury. Apprehension of psychological injury of harm is enough for granting judicial separation. Where accusation of unchastity were not only made by the husband without slightest foundation against the wife, but were made through lawyer as well as in the pleadings and the wife deposed that the allegations caused her much pain and suffering. It was held that the deleterious effects upon her mental and physical health are sufficiently proved.[6] The concept of 'cruelty' is based on mutual regard and consideration by each spouse for the each other. It excludes selfish brutality or disregards for the health needs, desires, and feelings of the other by either spouse given in a matter such as sexual relations between the two. Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse. Indeed, according to matrimonial experts, this sphere of conjugal life ought to be more sedulously guarded against psychological injuries than any other. Each spouse is entitled to expect the other to show due consideration and respect for the health, requirements, feelings, and sentiments of the other. The modern view, embodied in Section 10 (1) (b) of the Act of 1956, allows no discrimination between husband and wife in judging what is cruelty. The spouse has to be judged is not different. The need to pay particular attention to the mind of petitioner entitles the court to take into account the greater liability of a woman to psychological injury. Nevertheless, the approach by the Court to the whole question has to be unbiased towards either spouse.[7] If the husband ill-treats and beats his wife and the wife go to the police for reporting, it was held that cruelty has been established and absence of medical certificate is not material.[8] The wife administering 'love potion' to husband in belief that it would conduce to happy married life and as a result husband suffered in health and the wife repented for it. The apprehension of husband that things might

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1. *Dr. N. G. Dastane* v. *Mrs. Sucheta Dastane*, AIR 1975 SC 1534.
2. *Raghunath* v. *Vijaya*, 1972 Mh. LJ 110 : AIR 1972 Bom 132 : 73 BLR 840.
3. *Trimbak* v. *Smt. Kumudini*, 1966 Mh LJ 83 : AIR 1967 Bom 80 : 67 BLR 837.
4. AIR 1964 All 486 (Reversed on another point in *Smt. Chandra Mohini* v. *Avinash Prasad*, AIR 1967 SC 581.
5. AIR 1961 J&K 33 (DB); *Smt. Jogindra Kaur* v. *Sheocharan Singh*, AIR 1965 J&K 95 (DB).
6. AIR 1952 All 145.
7. AIR 1965 All 280.
8. 63 Punj LR 446 : AIR 1961 Punj 521.

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be repeated—wife's act is legal cruelty—subsequent cohabitation was held no condonation.[1] If the grievances are made of normal incidence of married life no legal cruelty can be attributed, nor can the husband's demand for money or taking away ornaments be regarded so.[2] Even isolated acts of violence to wife cannot be treated lightly in view of new rules of social behaviour.[3] Cruelty means legal cruelty as understood in English law, namely, injury, causing danger to life or limb or health or reasonable apprehension of such injury. It must be established that there is an apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other party. Even that is not enough, the court must be satisfied that this apprehension is reasonable having regards to all the facts and circumstances of the case. Moreover, even this is not enough to entitle the petitioner to relief, if the conduct of the petitioner himself disentitles him to any relief because if the court finds that the petitioner is taking advantage of his own wrong, it is the duty of the Court not to grant the relief. Where the ground of the petition is cruelty, the petitioner has to show that he has not in any manner condoned the cruelty.[4] Cruelty—Proof of—Motive or intention to be cruel as not necessary if conduct otherwise can be held to be 'cruelty'—Attempt made by husband during his insanity to strangulate wife's brother on one day and her young child on next day—Husband's conduct amounted to mental cruelty and was sufficient to cause grave apprehension in wife's mind regarding danger to life of her child and herself.[5] Unruly temper of a spouse or matrimonial wranglings cannot be said to amount to cruelty, nor would it be sufficient to show that the other spouse is whimsical, exacting, inconsiderate and irascible. Incompatibility of temperament, negligence or want of affection, wounding the feelings of the other, or expression of hatred of the life would not be regarded by themselves as cogent grounds for relief. Meaness, stinginess, shiftlessness, selfishness or defects of temperament cannot themselves amount to cruelty. The Court has to take account of the ordinary weaknesses and failings and short comings and should not be satisfied unless grave and substantial causes are established. Unhappiness in a marriage *per se* also does not amount to cruelty. The court has to bear in mind that husband and wife are made for each other and there is no question of give and take policy between them.[6] The word "treat" in Section 10 (1) (b) of the Act indicate merely the act on the part of offending spouse designed to be cruel. But a single solitary act of cruelty does not fall within the mischief of the section.[7] The husband indulging in love affairs in another woman and promissing to marry her, is the mental hurt amounting to cruelty and wife is entitled to get a decree for judicial separation.[8] Impotency of husband amounts to cruelty and the wife is entitled for judicial separation and mainte-

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1. 63 Punj LR 337 : AIR 1961 Punj 125.
2. AIR 1960 Punj 493.
3. AIR 1960 Punj 422.
4. 71 Bom LR 569 : 1969 Mah LJ 798 : ILR (1969) Bom 1024 : AIR 1970 Bom 312.
5. *Trimbak Narain Bhagwat* v. *Smt. Kumudini Trimbak Bhagwat*, 67 Bom LR 837 : 1966 Mah L7 83 : ILR (1966) Bom 482 : AIR 1967 Bom 80.
6. *Ramesh Chandra Ray* v. *Smt. Nandita Ray*, 1980 Hindu LR 205 : ILR (1978) 2 Cut 596.
7. *Shri Pranab Biswas* v. *Smt. Mrinmayee Dassi*, AIR 1976 Cal 156.
8. *Lalita Devi* v. *Radha Mohan*, AIR 1976 Raj 1.

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nance.[1] Every case must be judged on it's own facts on having due regards to the surroundings the circumstances and the word 'cruelty' cannot be put in straitjacket of judicial definition.[2] Abduction, with force of wife was a clear act of cruelty on the part of the husband and was such as to cause reasonable apprehension in the mind of wife of harm or injury within the meaning of Section 10.[3] When the wife was suffering from deadly disease and husband was prevented thereby from performing his marital functions amounted to a case of legal cruelty to husband.[4] In husband's petiti n for restitution of conjugal rights the wife raised the defence of cruelty. The husband, on certain occasions persuading his wife to accompany him and even pressing her for the same. This conduct on the husband's part giving rise to unpleasantness because wife was unwilling to go with him. It was held that such conduct on husband's part perfectly justified and could, by no stretch of imagination, be treated as cruelty.[5]

The parties were rustic cultivators, having no issue and were living apart for eight years. The husband had falsely charged the wife with immorality and adultery and persisted in that charge. In a petition for judicial separation by the wife on the ground of desertion and cruelty : Held, that having regard to all the circumstances, a reasonable apprehension in her mind had been caused that it would be harmful or injurious for her to live with the respondent and that she was entitled to a decree for judicial separation on the ground of cruelty.[6]

Cruelty under Section 10 (1) (b) need not be only physical but there can be mental cruelty. Abusing the husband in public, in a bus and catching hold of his collar, making the husband cook food for her and when he served the food, throwing the plate on his head on the ground that the food was not properly prepared and insisting on his asking her forgiveness, threatening to burn herself and to give a false complaint to the police so that her husband may come to trouble, when he was starting to the office with his colleague, catching hold of his neck and preventing him from taking the instruments used for his work, stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amounts all these would make it impossible for the husband to live with his wife. Where the wife tears the husband with such cruelty and causes reasonable apprehension in his mind that it would be harmful or injurious for him to live with her, a decree for judicial separation can be granted to the husband.[7] The husband has no right to forcibly drag the unwilling wife to his home which would amount to cruel treatment.[8] Wife's disapproval to maintenance of parents by husband and the wife using tawiz to creat hatred in his mind against the parents is not sufficient ground for judicial separation as they are normal incidence of conjugal life.[9] A couple who has passed married life for 17 years cannot be allowed to come out one day with a petition for judicial separation on the ground of

1. *Siraj Mohmedkhan* v. *Hafizunnisa*, AIR 1981 SC 1972 (A).
2. ILR (1969) Delhi 1042.
3. (967) 69 Punj LR 404 (Delhi).
4. AIR 1970 J & K 1958.
5. AIR 1970 MP 36.
6. *Smt. Umri Bai* v. *Chittar*, AIR 1966 MP 205.
7. AIR 1970 Mys 232.
8. 70 Punj LR 691 : ILR (1969) 1 Punj 251.
9. (1968) 70 Punj LR 879.

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cruelty which is really based on temperamental incompatibilities. Though it need not be generalised in such matters, still exceptional cases apart, broad considerations are relevant in deciding such petitions.[1] In difference to other spouse's relations or friends does not amount to cruelty. When the husband inflicts bodily harm to himself and in the context inaction of wife does not amount to cruelty to justify judicial separation. Wife creating scene in husband's office and searching his drawers for love letters is guilty of grave act of indiscretion. But such conduct is not a ground for judicial separation.[2] Thus where it appeared from the evidence that the trouble was not entirely due to wife's uncontrollable temper but the other side also contributed to it and that there was nothing to suggest that she deliberately intended to upset husband's mental and physical health (petitioner's claim that mental unrest caused to him make him a victim of diabetes not supported by evidence) the facts would not make out such cruelty as would support claim for judicial separation especially when condonation of alleged cruelty was implicit in his admission of cohabitation throughout.[3]

Marriage without vigorous sexual activity is an anathema. Noy it would be impossible to continue it for long without proper sexual satisfaction. Denial of sexual activity in marriage has an extremely unfavourable influence on woman's mind and body and leads to depression and frustration. There is nothing more fatal to marriage than disappointment in sexual intercourse. To force a wife to such sexless life, which would inevitably damage her physical as well as mental health, is nothing but cruelty and therefore she is entitled to a decree of judicial separation under Section 10 (1) (b).[4]

It is well established that to constitute cruelty so as to justify grant of a decree for judicial separation each case has to be judged on its own facts and circumstances, having regard to the conduct of the parties, their previous relations with each other, their status in life, the particular acts complained of and the causes that precipitated it. Acts of the wife soon after the marriage of exhibiting her ill temper, neglecting her domestic duties and resulting in the petitioner's attending office without food, and using insulting and abusive language, breaking bangles which symbolize the matrimonial union, striking head against wall and throwing away articles and setting fire to her clothes are enough to make the life of the petitioner husband intolerable.[5]

In a case where the wife appeared to be an arrogant and a temperamental woman and her misbehaviour with the husband consisted of total disrespect towards him and members of his family and unconcealed dislike for them all, besides constant nagging causing husband untold mental agony, it was held that the acts of wife amounted to cruelty.[6]

Both the spouses have to live together with mutual consent and when it is established that either spouse tried to use violence against the other and tried to compel either to live together or to accompany him or her, then even an

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1. 1975 All LJ 162.
2. 1975 All LJ 162.
3. *Smt. Aloka Dey* v. *Mrinal Kanti Dey*, AIR 1973 Cal 393 (DB).
4. *Mrs. Rita Nijhawan* v. *Shri Balkishan Nijhawan*, AIR 1973 Delh 200 (DB).
5. 1975 Jab LJ 376 : 1975 MPLJ 692 (DB).
6. 1975 Cur LJ 360 : 1975 Hindu LR 44.

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isolated incident of such use of violence amounts to cruelty against the other spouse.[1] Husband beating wife and driving her out on more than one occasion and openly declaring that he would not keep her amounts to cruelty within Section 10 (1) (b) and is defence to the petition.[2] The plea of condonation of cruelty must be raised specifically and cannot be inferred.[3]

6. Adultery.—Adultery means consensual sexual intercourse between a married person and another person of the opposite sex during the subsistence of the former's marriage.[4] Where as against a period of about 15 months during which the petitioner's wife was told to have lived in adultery, there was a period of over 2 years about which there was absence of evidence to show that she lived in adultery during that time, it was held that the wife's conduct would fall within Section 10 (1) (f).[5] Adultery must be proved beyond reasonable doubt and not merely on balance of probability.[6] Meaning of adultery is observed in *Jyotish Chandra Guha* v. *Smt. Meera Guha.*[7] A wife severing connections with husband once for all and living with parents and no kind of access between the couple during which a child was born to the wife. It is a proof that a child was born only as a result of wife's sexual intercourse with some one other than the husband.[8] Adultery can very rarely, if ever, be proved by direct evidence of witnesses who saw parties in *flagrante delicto.* In most cases evidence must be circumstantial. When unrelated person is found alone with young wife after midnight, in her bed room, in actual physical juxtaposition, unless there is some explanation for this which is compatible with innocent interpretation, only interpretation must be that the two were committing act of adultery together.[9] The words 'is living in adultery' means a continuous course of adulterous life, as distinguished from one or two lapses from virtue. The standard of proof of adultery in matrimonial suit, is proof beyond reasonable doubt. Adultery from it's nature, is a secret act. Direct evidence of an act of adultery is extremely difficult. The Court will tend to look upon direct evidence, even if produced, with disfavour as it is highly improbable that any person can be a witness to such an act as such an act is generally performed with utmost secrecy.[10] The dismissal for default of petitioner's appearance order amounts to a decree and is appealable.[11] In a petition the petitioner making allegations of adultery with one J then J is necessary party. Question regarding necessary party is to be decided independently of evidence likely to be produced.[12] Adultery has to be proved mainly by circumstantial evidence and cannot be proved mainly by direct evidence. The burden of proof is on the person who made the allegations. The standard of proof of adultery is not as strict as in criminal

1. AIR 1960 Punj 422 ; 1967 Punj LR (Delhi) 404 ; and 1968 Cur LJ 442, Rel. on 1975 Hindu LR 31 (Punj).
2. 1972 Cur LJ 751.
3. *Devi Singh* v. *Smt. Sushila Devi*, AIR 1972 Raj 303.
4. *Gitabai* v. *Fattoo and another*, AIR 1966 MP 130 (DB).
5. AIR 1958 Bom 264 (DB).
6. AIR 1970 Cal 266.
7. *Jyotish Chandra Guha* v. *Sm. Meera Guha*, AIR 1966 MP 130.
8. *Dr. H. T. Vira Reddi* v. *Kistana*, AIR 1969 Mad 235 (DB).
9. *Subbarama Reddiar* v. *Saraswathi Ammal*, AIR 1967 Mad 85.
10. (1966) 2 Mad LJ 425 ; 79 Mad LW 393.
11. *Tirukappa* v. *Kamalamma*, AIR 1966 Mys 1.
12. *Omprakash* v. *Smt. Santosh*, 1976 Mah LJ (Notes) 78.

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case. Levelling of allegations of adultery without proper foundation and basis would constitute mental cruelty on the other spouse.[1] The disinterested testimony of witnesses to the effect that they had seen respondent and other persons sleeping together in nights held sufficient proof.[2]

7. **Decree and appeal.**—Section 10 (2) empowers the court to rescind the decree for judicial separation, if it considers it just and reasonable to do so. The statute, no doubt, does not refer to any specific grounds on which the decree for judicial separation can be annulled or rescinded. But a reading of Section 10 (2) of the Act shows that a party against whom a decree for judicial separation is passed cannot succeed in getting the decree rescinded in absence of other circumstances which justify an order of rescission to be passed, merely by saying that he or she is willing to rejoin and live with the other spouse. The power conferred on the court under Section 10 (2) of the Act has to be exercised with great circumspection.[3]

The adjudication under Sections 9, 10, 11 and 13 of the Act are regarded as decrees only for the porposes of these sections only and they cannot be treated as decrees within the meaning of Section 2 2) of C. P. C. Such decrees are, therefore, outside the purview of Section 96, C. P. C., alone can fall within the category of regular appeals and should be registered as such, the appeal from the above decrees can only be registered as a civil miscellaneous appeal and not as a first appeal.[4] Consequently, a right of second appeal against an appellate decree made by the court in a petition for judicial separation under Section 10 cannot be found in the Code.[5] The dismissal of petition under Section 10 of the Act, for default of petitioner's appearance amounts to a decree and is appealable as such.[6]

The applicability of C. P. C. by virtue of Section 21—The proceedings on petition are suits and decrees passed therein are appealable under Section 96 and Second Appeal under Section 100 is competent.[7] The husband filed a suit for restitution of conjugal rights under Section 9 and subsequently wife filed a petition for judicial separation under Section 10 and both the proceedings were consolidated and both the petitions were dismissed by common judgment and the consolidation of proceeding does not result in consolidated decrees and the decrees in two proceedings are separate. The husband did not appeal from dismissal of his suit and is barred by *res judicata* in getting a decree in his favour in wife's appeal against dismissal of her petition for judicial separation. Failure of suit for restitution of conjugal rights necessarily means success of wife's ground for judicial separation.[8] Where a petition for dissolution of marriage has resulted in consent decree for judicial separation without proving any of the grounds mentioned in Section 10, it was held that decree was in

1. *Smt. Swayamprabha* v. *A. S. Chandrashekhar*, AIR 1982 Kant 295 (DB). See also *Binod Anand Lakra* v. *Smt. Belulah Lakra*, AIR 1982 Pat 213 (DB).
2. *M. Akkamma* v. *M. Jagannathan*, AIR 1981 AP 269 (DB).
3. *Narsimha Bhandary* v. *Vijaibai*, AIR 1978 Kant 115 (DB).
4. AIR 1961 AP 359 (DB).
5. *Bai Umiyabhen* v. *Ambalal Laxmidas*, AIR 1966 Guj 139 (DB).
6. *Tirukappa* v. *Kamalamma*, AIR 1966 Mys 1 (DB).
7. *Kusum Lata* v. *Kampta Prasad*, AIR 1965 All 280.
8. Ibid.

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violation of Section 23 (1) and therefore without jurisdiction and the divorce could not be granted later on, on the ground that there was no resumption of cohabitation.[1] Section 96 of C. P. C. does not apply for consent decree for dissolution of marriage on grounds other than those mentioned in Sections 10 and 13 of the Act and second appeal is competent.[2] The judicial separation does not end marital relationship and decree for divorce is necessary.[3]

The expression "it shall no longer be obligatory for the petitioner to cohabit with the respondent" in Section 10 (2) can, on a fair and correct interpretation only mean that the petitioner having obtained an order of separation from the court is protected from the overtures of the respondent and both parties are relieved of the obligation to cohabit.[4] The application under Order 9, Rule 13, C. P. C. could not be treated as an application under Order 9, Rule 13, pure and simple. It could be treated as an application under Section 10 (2) of Hindu Marriage Act. The application under Section 151 C. P. C. for its restoration on the ground that the opposite party was prevented by sufficient cause from appearing in the case was fully competent and maintainable.[5] The appeal is maintainable against decree under Section 10 even if the memorandum is not accompanied by the copy of decree, because orders under the Act though named decrees are appealable as orders.[6] The decree for judicial separation is valid even if no effort was made by the court for the reconciliation between the parties.[7] The application for judicial separation by the wife under Section 10 the husband did not contest and the decree was passed on the basis of the statement of the wife is not legal in view of Section 23 (1) (c).[8] Even a judicial personage must move with the times. To judge a matter as this, of the mid-twentieth century in the light of the rigid conventions of the mid-Victorian era will be to misjudge the whole thing.[9] In the field of matrimonial relationship a purely mechanistic and formal approach is not desirable. There should be broad perspective. If there is danger that a decree for judicial separation may bring about some manner of rupture in the relationship which prevails between the parents and their issue such a decree should not be granted where the spouses have lived together for a long time.[10] The passing of a decree for judicial separation on the statements of the parties without the court giving any finding is against the provisions of the Act and is invalid.[11]

8. Section 10 and other enactments.—The Hindu Marriage Act deals specifically with marriage. Hence unless in any other enactment there is a provision which abrogates any provision of the Hindu Marriage Act or repeals it expressly or by necessary implications, the provision of the Hindu Marriage

1. AIR 1971 All 201.
2. *Smt. Kamla Devi* v. *Rajendra Pal Singh*, AIR 1972 All 338.
3. AIR 1976 AP 77.
4. *M. Narasimha Reddy and others* v. *M. Boosamma*, AIR 1975 Bom 88.
5. *Smt. Saraswati Devi* v. *Ram Nandan Sharan*, AIR 1974 Pat 260 : 1975 Hindu LR 416.
6. *Raj Rani* v. *Harbans Singh Chhabra*, AIR 1972 Pat 392 (DB).
7. Ibid.
8. 1971 Cur LJ 778.
9. *Jyotish Chandra* v. *Meera*, AIR 1970 Cal 266.
10. *S. N. Tripathi* v. *Savithri Tripathi*, 1975 All LJ 162.
11. *Mahesh Chandra Sehgal* v. *Krishna Kumari*, 1971 Cur LJ 776.

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Act alone will be applicable to the matters dealt with and covered by the same.[1] Section 18 of the Hindu Adoptions and Maintenance Act does not amend or abrogate the provisions of Section 10 of the Hindu Marriage Act.

9. Evidence and burden of proof.—In a husband's suit for judicial separation on the ground of desertion the question was whether wife left husband's place with consent of husband. The evidence supporting the story of consent adduced by the wife was rejected it was not incumbent on the petitioner to adduce the negative evidence of his mother, etc. at the risk of an adverse inference being drawn against him in the event of his not doing so.[2] The burden of proof of desertion is upon the spouse who alleges desertion.[3] The essentials of desertion are : (1) the factum of separation (2) intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserting spouse is concerned (1) absence of consent (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home, to form the necessary intention as aforesaid. The burden of proof is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court the desertion throughout the entire period of two years immediately preceding the petition as well as that such desertion was without just cause.[4] A decree for judicial separation can only be granted to a petitioner who comes to the Court with clean hands, that is, free from matrimonial misconduct. Where there is no evidence of the husband's adultery, the Court is right in refusing to exercise its discretion in favour of wife. In order to succeed on the plea of desertion, it must be shown by the wife that she was obliged to leave her husband's house because of his conduct and against her own wishes.[5]

Where the evidence discloses that the wife was compelled to leave her husband's house under compelling circumstances, viz., such as the husband leading an immoral life which would make it impossible to establish a sweet home and there was no intention to leave her husband's house for good, it cannot be said that such a conduct would amount to desertion. The onus is on husband seeking judicial separation to satisfy the Court by adequate evidence that the desertion was without reasonable cause.[6] If the husband has written letter to his wife in anger, saying that he would have nothing to do with his wife's people thereafter held no evidence of desertion by husband.[7] It is certainly not a subjective feeling that the section demands. No doubt, a husband may have cause to feel dissatisfied or even unhappy with his wife. He may feel quite annoyed too. But these feelings are not sufficient to enable the Court to order judicial separation.[8]

A petition for judicial separation was filed by the husband in 1967 on the allegation that wife has deserted him since 1954 and the spouses were

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1. *Rohini Kumari* v. *Narendra*, AIR 1972 SC 459.
2. *Lachman* v. *Meena*, AIR 1964 SC 40 : 66 BLR 297.
3. 61 Bom LR 1549 : AIR 1960 Bom 413 (DB).
4. *Parihar Priti* v. *Prihar* (*Kailash Singh*), AIR 1978 Raj 140 ; AIR 1960 Bom 418 : 61 Bom LR 1549 (DB).
5. AIR 1961 Punj 152.
6. (1965) 1 Mad LJ 149.
7. AIR 1960 Punj 493.
8. 1963 Ker LJ 29 ; 1962 Ker LT 912.

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living apart throughout for 21 years without explaining the delay. The letter exchanged bearing eloquent testimony not of holy wedlock but holy deadlock and the husband substantially repudiated the blameless spouse i.e. respondent. It was held that though marriage had irretrievably broken down in law and the Court is helpless to grant any remedy.[1] The matters falling within the scope of Sections 10, 13 and 23 the Court must be vigilant to see that the burden of proof is sufficiently discharged with due regard to social conditions and the manner in which parties are accustomed to live must be given.[2] The Court cannot normally act upon the uncorroborated evidence of petitioner to find guilt of the respondent.[3] If the case for grant of judicial separation on any of the statutory grounds not made out the Court cannot grant separation in its discretion.[4] In a petition by husband for judicial separation on the ground that his wife was suffering from syphilis without proof of the fact for a period of three years before the petition, the relief was refused.[5] The mere fact of having been found in the company of another person is not sufficient to infer an act of adultery or sexual intercourse. The wife of the respondent had been dragged into a shed by a person other than her husband by holding her hand. This act, under Hindu Marriage Act, would not amount to having sexual intercourse with any person other than her or her spouse.[6] The proof required in a petition for judicial separation is qualitative and not quantative and corroboration is not a matter of law but matter of precaution.[7] In a judicial separation the onus heavily lies upon suing spouse to prove his or her case as one required in criminal prosecution.[8]

A person who claims dissolution of marriage on the ground that his wife delivered a child on 209th day after he had access to her and hence his wife was living in adultery and the child was illegitimate must adduce evidence to prove that the child when born was fully mature and hence it was born out of wedlock and the mother was guilty of adultery. Apart from the presumption of legitimacy under Section 122, Evidence Act, it would be in the highest degree unjust to impute illegitimacy to an offspring or want of chastity to parent simply because the child was born in seven months and was still living. The standard of proof in matrimonial cause in India is proof beyond reasonable doubt.[9]

If the husband fails to prove the acts attributable to *animus deserendi* of the wife, the petition for judicial separation or divorce must fail. The question of mutual cruelty should be decided in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status of the parties environment of the parties etc.[10]

The burden of proof is on husband to establish that the wife was pregnant at the time of marriage. The testimony of doctor who was expert in midwifery

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1. *Mohinder Pal* v. *Smt. Kulwant Kaur*, AIR 1976 Delhi 141.
2. AIR 1971 Guj 33.
3. *P. V. Veeraraghavan* v. *T. S. Parvathy*, AIR 1974 Ker 43 (DB).
4. Ibid.
5. *Madhusudan* v. *Smt. Chandrika*, AIR 1975 MP 174.
6. (1967) 1 Andh WR 179.
7. ILR (1970) 1 Cal 272.
8. (1969) 73 Cal WN 143.
9. ILR (1975) 1 Ker 222 (DB).
10. *S. Bijoli Choudhary* v. *Sukomal Choudhary*, AIR 1979 Cal 87.

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but not in gynaecology cannot be rejected.[1] In the petition by wife for judicial separation, on the ground of 'Cruelty', wherein she had applied for interim alimony. The Court disposing of the main petition first was wrong.[2] The application by husband for restitution of conjugal rights and by wife for judicial separation respectively in two different States, the Supreme Court can transfer one to enable consolidated trial.[3] When the wife applied for restitution of conjugal rights and husband applied for judicial separation wherein the grounds given by wife were disbelieved the question regarding judicial separation will depend on onus of proof.[4] If the spouses cohabit during the pendency of the proceedings the question of condonation will depend on the circumstances in the absence of compulsion, sexual intercourse probabilises condonation.[5] In a claim for judicial separation on the ground of cruelty, the particulars of cruelty must be alleged and proved to sustain a charge of cruelty the petitioning spouse must give the necessary particulars to enable the defending spouse to meet the case. It cannot be said that on the basis of allegation in the written statement alone a decree for judicial separation can be founded for in that case, the defending spouse will never have a chance to properly defend him or herself Cruelty at the hands of the defending spouse has to be proved.[6]

10. Constructive desertion.—The offence of constructive desertion must be proved beyond doubt, and the ingredients of the offence must be followed. The wife did not leave the home of her own accord but was forcibly turned out. The case was therefore not of simple desertion but constructive desertion of the wife by the husband. Although the wife had left the home it must be held that it was the husband who deserted her. Once a spouse is deserted, the presumption is continuous. The evidence showed that the husband was at no time willing to take the wife back. The presumption was, therefore, not necessary. The case satisfied all requirements to prove that the husband was guilty of desertion.[7]

The standard of proof beyond reasonable doubt does not mean that it should reach certainty. But it must carry a high degree of probability. For a limited purpose, depending upon the particular facts of such case and also depending upon the nature of competing rival theories, it will not be improper for the Court to take into consideration the fact that the case of one party has been proved to be completely false. At the same time it has to be borne in mind that that itself would not amount to holding that the appellant has discharged the burden.[8] The proof of isolated act of adultery is sufficient for the relief of judicial separation while for the relief of divorce the course of immoral conduct must be more or less continuous. The spouses are competent to give evidence about access or non-access, to either of them.[9]

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1. *Baldevraj Miglani* v. *Smt. Urmila Kumari*, AIR 1979 SC 879.
2. *Mythil Raman* v. *Capt. K. T. Raman*, AIR 1976 Mad 260.
3. *Guda Vijayalakshmi* v. *Guda Ramchandra*, AIR 1981 SC 1143; *Priyavari Mehta* v. *Priyanath Mehta*, AIR 1980 Bom 337 and AIR 1977 Punj 373 overruled.
4. AIR 1971 Punj 35.
5. (1966) 70 Cal WN 633.
6. ILR (1969) Delhi 1042.
7. (1967) 8 Guj LR 557.
8. *Dr. H. T. Vira Raddi* v. *Kistamma*, AIR 1959 Mad 235 (DB).
9. Ibid.

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A relief of restitution of conjugal rights was filed by the wife after 5 years of separation, on grounds of cruelty and impotence of husband etc. The wife's sole and uncorroborated evidence cannot be relied upon.[1]

In a petition by husband for judicial separation he must succeed on strength of his own case and must prove facts alleged in his petition before asking the Court to grant decree for judicial separation. If the evidence produced by the husband is not worthy of credence the petition will have to be dismissed without finding out probabilities of case from evidence of wife.[2]

11. Court—Forum, Jurisdiction and duty of.— An appeal from an order passed under Section 24 of the Act, by a Civil Judge, who is a District Court within the meaning of the Act, is a proceeding commenced from a petition under Section 10 of the Act which petition does not mention any value on the face of it lies to the High Court and not to the District Court. There is no law directing how the value of the subject-matter of a petition under Section 10 for the purpose of jurisdiction is to be fixed.[3]

A petition for divorce was filed on the basis of earlier decree for judicial separation by the Court wherein objection as to validity of decree for judicial separation on ground of lack of territorial jurisdiction was raised. It was held that such objection could not be entertained in divorce proceedings.[4]

In a petition for judicial separation by the husband under Section 10 the Court awarded maintenance *pendente lite*. The husband made default in payment, in which case the Court should stay the proceeding.[5]

A petition for judicial separation was decided not by the District Court or by Civil Judge but by the Judge of the Small Cause Court. It was held that notwithstanding provision for appeal under Section 28 appeal was not competent in view of provisions of Section 96, C. P. C. and Section 27 of Provincial Small Cause Courts Act. The appeal cou'd also be not treated as revision as no question of jurisdiction was raised in grounds of appeal.[6]

In a petition for judicial separation by the husband under Section 10 the husband fai ed to prove that wife deserted him. The petition was dismissed and appeal was preferred and during the pendency of the appeal the husband offered his wife to take back her in his home and to maintain her. This offer was not made in the trial Court. The husband opposing maintenance proceedings tooth and nai transferred the lands standing in his name in favour of his brother after order of maintenance. It was held that the offer was not genuine and the wife is justified in not accepting it.[7] In matrimonial cases Judge should app y some standard of proof in arriving at all the findings.[8] *Ex parte* decree was passed in petition filed by wife under Section 10 was set aside in appeal by husband and the case was remanded back to the trial Court. The husband

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1. *K. V. Revanna* v. *Suseelamma*, AIR 1967 Mys 165 : (1966) 1 Mys LJ 44.
2. 1968 Cur LJ 840 (Punj.).
3. AIR 1961 All 395 (FB).
4. *Omprakash Dhawan* v. *Santosh Kumari*, AIR 1965 Mys 110 (DB).
5. AIR 1963 Punj 249.
6. *Shesh Narain Dikshit* v. *Smt. Savitri*, AIR 1967 All 156.
7. *Shyam Chand* v. *Smt. Janki*, 1966 Cr LJ 1438 : AIR 1966 HP 70.
8. *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235 (DB).

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who was contesting the petition on merits before the trial Court raised objection as to territorial jurisdiction, which was not contended in appeal. It was held that the husband neither waived such objection nor submitted to jurisdiction of the Court.[1]

In husband's application for judicial separation the relief was delayed for ten years due to lower Court's holding erroneous views. If award of relief of judicial separation had not been so long delayed, husband would have been entitled to relief of divorce under Section 13 (1A) (*i*) read with Section 23, there having been no reunion between the parties for past over ten years, between the parties. The question would be the Court whether can pass decree for judicial separation dating back to the date of petition and a decree for divorce under Section 13 (1A) (i), considering the maxim *actus curiae neminem gravabit*, and act of the Court shall prejudice no man, and the precedents in which by the application of this salutary principle of justice underlying this maxim judgments have been entered retrospectively to meet the justice of the case, the decision taking effect for a period long anterior to the date of judgment.[2]

In the same case it is also held that prayer for lesser relief can be granted.

The *ex-parte* decree for judicial separation was passed by the trial Court without keeping in view duties cast on it by Section 23 and hence decree under Section 10 (2) was set aside.[3] The wife's application under Section 10 dated 6-6-1967 was wrongly dismissed and the appeal was allowed on 20-3-1975 The delay in proceedings in trial Court and the appellate Court could not grant decree for judicial separation with retrospective effect from the date of application to enable the wife to apply for divorce at once, since such course would negative the provisions of Section 13 (1A) (i) of the Act.[4] The applications under Sections 10 and 24 being tried together the Court cannot dispose of the application under Section 24 after determining of main petition.[5]

12. Pleadings and procedure.—In the petition for divorce alleging cruelty and adultery alternative prayer for judicial separation can be added by amendment in the pleadings under Order 6, Rule 17 of C. P. C.[6] Similarly two petitions need not be filed for two reliefs under Sections 10 (1) and 13 of the Act. When application under Section 10 (1) is allowed to be withdrawn, order under Section 25 (1) cannot be passed.[7]

The words 'respondent' and 'petitioner' in Section 24 refer not to the respondent and petitioner to the main proceedings for judicial separation, etc., but to the particular application under Section 24 of the Act. Thus where an application under Section 24 is made by the wife against whom the husband has filed a petition under Section 10 of the Act, the wife is the petitioner and

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1. AIR 1970 J & K 19.
2. *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235 : 81 Mad LW 490 : (1969) 1 MLJ 366.
3. *Anupama Misra* v. *Bhagaban Misra*, AIR 1972 Orissa 163.
4. The judgment in *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235 dissented from 1975 Hindu LR 31 (Punj).
5. AIR 1975 Raj 8.
6. *See* AIR 1961 AP 122.
7. AIR 1962 Bom 27.

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the husband is the respondent for the purposes of Section 24.[1] It is desirable that specific allegations in detail should be pleaded in a matrimonial cause; not however the evidence by which such allegations have to be proved. Each case will depend on its facts and circumstances. No specific allegations in detail in the pleadings, nor relief cannot be a formula of universal application, irrespective of facts in a particular case.[2]

13. Maintenance.—While dismissing husband's application for judicial separation permanent alimony or maintenance cannot be granted to the wife.[3] The decree for judicial separation does not necessarily operate as a bar to claim maintenance under Section 488 Cr. P. C. (old) and Section 125 of Cr. P. C. (new).[4] In an application for increased maintenance allowance granted under Section 488 of Cr. P. C. the husband produced decree for judicial separation. It was held that wife is not entitled for maintenance. The Magistrate can take judicial notice of decree and cancel even original order of maintenance.[5]

The grounds for the relief of judicial separation can be lucidly considered as follows on any one or more grounds :—

(1) That the respondent has, after solemnisation of marriage had voluntary sexual intercourse with any person other than his or her spouse.

(2) That the respondent has, after the solemnisation of the marriage treated the petitioner with cruelty.

(3) That the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

(4) That the respondent has ceased to be a Hindu by conversion to another religion.

(5) That the respondent has been incurably of unsound mind or has been suffering continuously or intermittently from mental disorder of such kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

(6) That the respondent has been suffering from a virulent and incurable form of leprosy.

(7) That the respondent has been suffering from veneral disease in a communicable form.

(8) That the respondent has renounced the world by entering any religious order.

(9) That the respondent has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it had that party been alive.

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1. 1965 MPLJ (Notes) 135.
2. (1969) 73 Cal WN 502 : ILR (1970) 1 Cal 27.
3. *Purshotam Kewalia* v. *Smt. Devki*, AIR 1973 Raj 3.
4. *Nathu Ram* v. *Smt. Atar Kunwar*, 1969 Cr LJ 517 : 1968 All LJ 697 : AIR 1969 All 191.
5. *Dahyalal Amathalal Bhagat* v. *Bai Madhukanta*, 1966 Cr LJ 247 ; AIR 1966 All 133 ; (1965) 2 Cr LJ 49 ; AIR 1965 Guj 247.

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(10) That the respondent has been suffering from epilepsy.

(11) That since the solemnisation of the marriage the husband has been guilty of rape, sodomy or bestiality.

(12) That the respondent was impotent.

(13) That the marriage had been solemnised (whether consummated or not) before she attained the age of 15 years and she had repudiated the marriage after attaining the age but before attaining the age of 18 years.

(14) That a decree or order, as the case may be, had been passed in a suit under Section 18 of Hindu Adoptions and Maintenance Act, 1956, or in a proceeding under Section 125 of Cr. P. C. 1973 and that since the passing of such decree or order cohabitation between the parties had not been resumed for one year or more.

(15) In the case of marriage solemnised before the commencement of this Act, the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of solemnisation of marriage with the petitioner provided that in either case the other wife was alive at the time of petition.

Nullity of Marriage and Divorce

11. Void marriages.—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto [1][against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of Section 5.

SYNOPSIS

1. General.
2. Marriage void *ipso jure*.
3. Scope.
4. Void marriages.
5. Contravention of conditions—Marriage null and void—No "wife" and "no maintenance".

1. General.—From the point of view of nullity of marriages, the Act divides the marriages into two : void marriages and voidable marriages. A void marriage is a complete nullity. It implies that parties were never husband and wife. A voidable marriage is a perfectly valid marriage so long as it has not been declared null and void by a Court of law. Section 11 deals with cases of void marriages. Section 12 with voidable marriages and Section 13 with divorce. A child begotten or conceived before a decree under Section 11 or 12 will be deemed to be their legitimate child under Section 16.

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1. The words in brackets substituted by the Marriage Laws (Amendment) Act, 1976.

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2. Marriage void ipso jure.—Marriage under the Act is the voluntary union of one man with one woman to the exclusion of all others satisfied by the solemnization of the marriage. A marriage may be solemnized in the sense that the parties to it have gone through the customary rites and ceremonies of either party thereto as laid down in Section 7. But such a marriage to be valid must in any event fulfil three of the conditions enacted in Section 5.

3. Scope.—The section is not applicable to marriages solemnised before the commencement of this Act. Under the section, the husband or the wife has to present the petition, if the marriage between them is to be declared null and void or if a dispute arises between the parties and others regarding the validity of the marriage. But a person who is not a party to the particu ar marriage sought to be declared void has no *locus standi* to seek relief under t he section. A suit for a declaration that the marriage in question is void may be filed by him under Section 9, Civil Procedure Code read with Section 34, Specific Relief Act.[1] The words "either party to the marria ge" have reference to the actual parties to the marriage.[2] The words "against the other party" set at rest conflicting views on the question whether a petition can be filed under the Section after the death of the other spouse and against a third party. As to this see *Gouri* v. *Thulasi*,[3] *Lakshmamma* v. *Thayamma*,[4] *Tulsan Devi* v. *Krishni Devi*,[5] *Kusumkumari* v. *Jadeja*,[6] *Ponnuthayi* v. *Kamakshi*.[7] They make it clear that the petition can lie only against the other party to the marriage and hence it can be brought only during the lifetime of the parties to the marriage. The remedy provided by the section is of a summary nature and available only to the actual parties to the void marriage. The section is not violative of Article 15 (1) of the Constitution.[8] In *Chinnaswami* v. *Rajamba*,[9] it was held that a second marriage contracted during the period when the Madras Hindu Bigamy Prevention and Divorce Act (VI of 1949) was in force being void under Section 4 thereof, cannot become valid by reason of the repeal of that Act, and the "husband" is entitled to the declaration that the defendant is not his wife on account of the marriage being void.

4. Void marriages.—Void marriages are marriages which violate the provisions of clauses (i), (iv) and (v) of Section 5 namely, a marriage when either party to it has a spouse living at the time, a marriage contracted between parties who are within prohibited degrees and a marriage contracted between relations who are Sapindas of each other. The petition for getting a void marriage declared as nullity was dismissed for default under Order 9, Rule 8, C. P. C. Subsequent petition on the same ground is not barred by Order 9, Rule 9, C. P. C.[10] An application under Section 12 by husband seeking decree of nullity of marriage on the ground that wife had failed to give birth to a child and that she had not been keeping good health, is not maintainable,

1. *Harmohan* v. *Kamala Kumari*, (1978) 46 Cut LT 545.
2. *Lakshmi Ammal* v. *Ramaswami Naicker*, AIR 1960 Mad 6 ; *Shantabai* v. *Tarachand*, AIR 1966 MP 8.
3. AIR 1962 Mad 510.
4. AIR 1974 AP 255.
5. AIR 1973 Punj 442.
6. 1976 MPLJ 630.
7. AIR 1978 Mad 226.
8. *Sambireddy* v. *Jayamma*, AIR 1972 AP 156.
9. AIR 1961 Mad 325.
10. *Smt. Panno* v. *Makholi Ram*, AIR 1981 HP 47.

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as the grounds mentioned in the application were the no grounds for divorce under Section 13 of the Act. Annulment of marriage was sought in 1978 for alleged fraudulent obtaining of consent in marriage in 1973 and if the delay is not explained relief must be refused for latches.[1]

It will be too narrow a construction to hold that in every case whenever an issue of validity of marriage arises, having reference to the conditions of Section 5 the matter must be referred or the matter must come only to the original jurisdiction under this Act. The declaratory and remedial parts of the statute need not be intermixed. When the reliefs mentioned in Sections 9 to 13 are sought these provisions are exhaustive and compulsive and exclude the jurisdiction of other Courts. Marriage being a legal relation involving matters the same is in issue the powers of ordinary Civil Courts are not excluded. The Court can in appropriate cases grant relief of maintenance to woman from estate of her deceased husband even on its finding that marriage is void.[2]

Section 11 specifically enables either parties to the marriage to have it declared null and void by a decree of nullity against the other party. It does not confine the right to prevent the petition thereunder to the aggrieved party alone. Secondly the Limitation Act, 1963 does not apply to a suit or proceeding under the law relating to the marriage and divorce vide Section 29 (3) thereof.[3] If the husband is dead at the time of filing of the petition for declaration of nullity of marriage the petition is competent even though the husband dies.[4] If the husband marry with a second wife when first is living, the second marriage is void even though necessary ceremony have gone through. The passing of a decree of nullity is not necessary and the woman does not get status of wife nor the man the status of husband.[5] The applicant marrying opposite party during the life time of his first wife but before passing of the Act of 1955 it was held that wife was entitled to maintenance allowance.[6] Petition under Section 11 can be presented by a party to a marriage which is sought to be invalidated.[7] If the Hindu male marries during the life time of the first wife the first wife can sue for declaration that the second marriage is void. Suit is maintainable under Section 9 of the C. P. C. read with Section 42 of the Specific Relief Act. Filing of the suit in the Court of the District Judge is not obligatory.[8] If the parties to the marriage are Brahmins and there is absence of direct evidence relating to taking of seventh steps (*Saptapadi*), the marriage can be treated void.[9] The appeals from orders under Section 1 should be registered as Civil Miscellaneous Appeal.[10] The adjudication under Section 1. of the Act is regarded as decree only for the purposes of this section and they cannot be treated decree within the meaning of Section 12 (2) C. P. C. Such decree is there-

1. *Smt. Shakuntala Devi* v. *Amarnath*, AIR 1982 P & H 221.
2. *Smt. Rajeshbai* v. *Smt. Shantabai*, AIR 1982 Bom 231.
3. *Smt. Ainadevi* v. *Bachhansingh*, AIR 1980 All 174.
4. *Ponnuthayee Ammal* v. *Kamakshi Ammal*, AIR 1978 Mad 226.
5. *Bajirao* v. *Tolanbai*, 1979 MLJ 693 : AIR 1964 SC 1625.
6. 1964 All WR (HC) 665.
7. ILR (1964) AP 240 (DB).
8. (1964) 2 Andh WR 142.
9. AIR 1962 AP 311.
10. AIR 1961 AP 359 (DB).

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fore outside the purview of Section 96 of the C. P. C.[1] The clause (vi) of Section 5 is not such a condition rendering the marriage void.[2] The marriage of a girl below 15 years in contravention of Section 5 (iii) is neither void under Section 11 nor voidable under Section 12. The decree of nullity of marriage under Section 11 cannot be passed after the death of one of the spouses.[3] A suit by a Hindu wife for perpetual injunction restraining her Hindu husband from contracting second marriage is triable by the Court of the Civil Judge, J. D. The suit is permitted by Section 54 of Specific Relief Act.[4] The petition for annulment of husband's second marriage can be presented under Section 11 only by the husband or his second wife and the first wife cannot present petition under the Act but can seek remedy under the general law.[5] The remarriage in contravention is *void ab initio* and mere declaration under Section 11 of the Act is necessary and Section 15 proviso is itself imperative and mandatory.[6] Second marriage of a Hindu husband during the continuance of the first is void.[7] If the condition in Section 5 (ii) is not fulfilled the marriage is not a void marriage as provided in Section 11 but voidable marriage under Section 12.[8] A suit for nullity of marriage under Hindu Marriage Act was filed by the wife wherein husband alleged that the parties are Christians and therefore the Hindu Marriage Act is not applicable in the result the Court dismissed the suit. Subsequently a suit was filed by wife under Divorce Act. Husband is not estopped from denying that wife was Christian. The decree being a Judgment *in rem* cannot be based on principle of estoppel.[9] Person marrying sister's daughter after enforcement of the Act that position of wife no better than concubine. Such a marriage was not prohibited by Shastras or Hindu Law, as administered prior to the prohibition of such marriages by statutes.[10] Nullity decree is available *ipso jure* only on the grounds (i) (iv) and (v) stated in Section 5. Other grounds stated in Section 5 for exam. minority of the spouse and or non consent of the guardian do not *ipso jure* entail nullity of marriage.[11] The declaration under Section 11 is sufficient where marriage is void.[12] In a void marriage the wife cannot claim maintenance under Section 488 Cr. P. C[13] The marriage of bridegroom below 18, bride below 15 years is void *ab initio*.[14] The provisions of Sections 11 and 17 do not offend

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1. AIR 1961 AP 359 (DB).
2. *Mst. Premi* v. *Daya Ram*, AIR 1965 HP 15.
3. AIR 1962 Mad 510.
4. AIR 1967 Mys 247.
5. AIR 1963 Pat 311 (DB).
6. 1968 All LJ 683.
7. *Naurang Singh Chuni Singh* v. *Smt. Sapla Devi*, 1968 Cr LJ 1636 : AIR 1968 All 412.
8. *Ajitrai Shivprasad Mehta* v. *Bai Vasumati*, AIR 1969 Guj 48.
9. (1968) 9 Guj LR 511 : ILR (1967) Guj 1003.
10. AIR 1970 Mad 402.
11. ILR 1970 Cut 1215.
12. *Banshidhar Jha* v. *Chhabi Chatterji*, AIR 1967 Pat 277,
13. Ibid.
14. AIR 1975 AP 193.

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Article 15 (a) of the Constitution.[1] Where husband of the first marriage is alive and there is also no valid divorce between the parties it being brought about by minors the second marriage of the wife is null and void even if it is assumed that the second marriage was proved.[2] The child born from a void marriage not decreed null, whether deemed legitimate.[3] It is not necessary under Section 11 that both the parties to the marriage should be alive at the time of the institution of the petition.[4] The averment of non collusion required under Section 11 is necessary only if the case so permits.[5] For nullity of marriage the petition under these sections and not a civil suit is the proper remedy.[6]

Where, in the proceedings for a decree for nullity of marriage on husband's petition against his wife on the ground of her impotency, the evidence was that it was only one night after the marriage that the husband attempted to consummate the marriage but the wife deliberately refused to submit because she had been forced to marry him against her wish, and that soon after that she went to her parents and there was no second attempt made by the husband.

Held that it could not be assumed that the wife was incapable for sexual intercourse or a victim of such an invincible repugnance to the physical act. The husband failed to establish impotency of his wife on the day of marriage and its continuation until the institution of proceedings. The case was one of desertion rather than of impotency.[7] The first wife while she can get an order for judicial separation as against the husband cannot maintain an application under this section for declaration of nullity of the second marriage.[8] It is provided in Section 16 of this Act that despite the declaration of nullity, the offspring of the marriage, male or female, is legitimate with the right of inheritance to either of the parents and under Sections 24 and 25, provisions are made for maintenance *pendente lite* and expenses of proceedings to either spouse who is without means when a petition is instituted under Section 11 for declaring the marriage a nullity.

5. Contravention of conditions—Marriage null and void—No "wife" and no "maintenance".—In the instant case, there is no dispute that the marriage solemnized between the petitioner and the respondent No. 1 had contravened the provisions of Section 5 (i), for at the time of the said marriage the first respondent had a wife living and the said marriage between them was subsisting. The result, therefore, was that by reason of Section 11 of the Hindu Marriage Act, marriage between the petitioner and the Ist respondent was null and void. The consequences of such a marriage being null and void or "void *ipso jure*" was that although the marriage was solemnized by performing ne.essary ceremonies and as registered the same was

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1. *Gogireddi Sambireddi* v. *Gogireddi Jayamma and another*, AIR 1972 AP 156 (FB).
2. AIR 1971 HP 27.
3. *Thirumathi Ranayammal* v. *Thirumathi Mathumal*, AIR 1974 Mad 321.
4. *Nagavva* v. *Parvathavva*, AIR 1974 Mys 8 (DB).
5. *Smt. Tulsan Devi* v. *Smt. Krishni Devi*, AIR 1973 Punj 442 (DB).
6. *Ibid.*
7. *Brij Vallabh* v. *Smt. Sumitra*, 1975 Raj LW 53 : 1975 Hindu LR 521 : AIR 1975 Raj 125 (128).
8. *Amarlal* v. *Vijaya Bai*, AIR 1959 MP 400.

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in law rendered nugatory as if not having taken place at all and consequently the parties to the same did not get a legal status of husband and wife. Accordingly, in such a case the woman cannot be considered to be a legally wedded wife of the man. The fact that Section 11 provides for filing of a petition by either party to have the marriage declared null and void by a decree of nullity did not make the marriage valid till the decree was passed as was the case in voidable marriages under Section 12 of the Hindu Marriage Act as in such a case obtaining of a decree of nullity was not a condition precedent for the marriage null and void.

The said position is also clear from the provisions of Sections 16 and 17 of the Act. Section 16 seeks to protect children of the marriage which was null and void under Section 11 of the Hindu Marriage Act, though illegitimate, as if they were legitimate by giving them a limited right of inheritance only to their parents' property. While Section 17 of the Act provides that such a marriage in contravention of Section 5 (1) of the Hindu Marriage Act was void and the provisions of Sections 494 and 495 of Indian Penal Code relating to an offence of bigamy were to apply. In view of the said provisions of the Hindu Marriage Act, it is quite clear that in the instant case the petitioner's marriage to the first respondent, being admittedly in contravention of Section 5 (1) of the Hindu Marriage Act, was null and void under Section 11 of the Act and, therefore, the petitioner could not be considered to be a legally wedded wife, of the respondent.

Since admittedly, at the time of marriage between the parties one of the conditions for the validity of marriages, as contained in Section 5 (1) of the Hindu Marriage Act, 1955 was contravened or not complied with, the said marriage was, under Section 11 of the Act, null and void, as if it had not taken place. In the absence of such a legal and valid marriage, a mere fact that the parties had lived together, as husband and wife to the knowledge of the public or otherwise, could not confer on such a woman a status of a "wife" however, otherwise one may term such a woman. The fact of the parties having lived together as husband and wife for a long time would be relevant to raise only a presumption in law of they being husband and wife. However, even such presumption itself was rebuttable on proof of marriage being invalid. That question, however, would not arise in the instant case. On the facts, therefore, the petitioner, could not be considered to be the "wife" of the respondent to claim maintenance under Section 125 of the Criminal Procedure Code, 1973.[1]

12. Voidable marriages. - (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :—

[2][(*a*) that the marriage has not been consummated owing to the impotence of the respondent ; or]

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of Section 5 ; or

1. *Smt. Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav and another*, 1983 Cr LJ 259 at pp 263 and 264 (Bom HC) (FB).
2. Cl. (a) of Section 12 Subs. by the Marriage Laws (Amendment) Act, 1976.

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(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [1][was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978)] the consent of such guardian was obtained by force [2][or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent] ; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1), shall be entertained if—

(*i*) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or

(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered ;

(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged ;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage ; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [3][the said ground].

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1. The words in brackets in Cl. (c) Subs. by Act No. 2 of 1978.
2. Subs. by the Marriage Laws (Amendment) Act, 1976.
3. Subs. by the Marriage Laws (Amendment) Act, 1976.

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SYNOPSIS

1. Scope of the section.
2. Impotency.
3. Lunacy and idiocy.
4. Consent by force or fraud.
5. Pregnancy of respondent at the time of marriage.
6. Limitation and condition.
7. Cohabitation.
8. Evidence and burden of proof.

1. Scope of the section.—This section deals with voidable marriage as distinguished from marriages covered by previous section. The difference between a void and voidable marriage is this, that in the case of a void marriage, there is no need to have it declared a nullity, though a decree of nullity may be obtained at the option of either party but in the case of a voidable marriage, though it is a voidable by a decree of nullity, it is not void *ab initio* and will continue to be valid unless and until it is set aside by the party aggrieved. The right of a spouse to the annulment of marriage by a decree is a new right created by the Act. Its scope has to be ascertained on with reference to the provisions of Section 12. Doctrines like "want of sincerity" and "approbate and reprobate have no place in the context of proceedings for nullity under the Hindu Marriage Act."[1] The Court has to be satisfied firstly that any of the grounds listed in the section exists and secondly, that the petitioner is not disqualified for any of the reasons stated in Section 23 (1) from being granted relief.[2] There can be no annulment of marriage on humanitarian grounds and a plea for avoidance of the same on the ground of domestic infelicity is unsustainable.[3]

2. Impotency.—The marriage of impotent person is not void *ab initio* but only voidable at the instance of the wife. So long as the wife does not choose to get the marriage annulled under Section 12 she is entitled to be maintained by her impotent husband.[4] Impotency means incapacity to consummate the marriage by actual sexual intercourse. Impotency of a spouse may be due to various causes both bodily and mental. A morbid and invincible repugnance to the act of consummation or disability to consummate owing to mental or moral causes such as hysteria or excessive sensibility or the absence of necessary organs or by the presence of excessively abnormal proportions of the sex organs or general weaknesses produced by self-abuse, or excessive sensibilities rendering sexual intercourse practically impossible on account of the pain it would inflict or an inveterate repugnance to the sex at resulting in the paralysis of the limb, will all be considered as constituting impotency for the purpose of sustaining a petition of a decree of nullity on the ground of marriage being voidable. Impotency may be due to invincible repugnance to the act of consummation resulting in the paralysis of the will[5]

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1. *S* v. *H*, AIR 1968 Delhi 79.
2. Ibid.
3. *Munishwar Dutt* v. *Indhar Kumar*, ILR (1963) 2 Punj 263 ; AIR 1963 Punj 449.
4. *Kanchupati Malla Reddy* v. *Kanchupati Subbamma*, 1956 Andh WR 590 : 1956 Andhra LT 815 : AIR 1956 Andh. 237.
5. *Bull* v. *Bull*, AIR 1938 Cal 584.

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or to temporary absence of desire or to timidity or to sexual over indulgence etc.[1] The mere fact that the respondent is afflicated with a venereal disease does not in law render him or her impotent. If the wife is capable of *vera capula* and *natural coitus*, the absence of pro-creating or conceptive powers is no ground for a decree of nullity. Barrenness or sterility is in no sense synonym of impotency. In *B* v. *B*,[2] it was pointed out that the incapacity to consummate the marriage, whatever be the reason of such impracticability whether due to structural defect or otherwise, amounts to impotency justifying the Court's interference for relief. Prior to the amendment in the clause by Act 68 of 1976 to obtain a decree of nullity the petitioner would have to establish that the respondent was impotent at the time of the marriage and continued to be so till the institution of the suit.[3] Before the amendment, if a party was not impotent at the time of marriage but became impotent before the institution of the suit the petitioner would not be entitled to a decree. Alternatively if the respondent was impotent at the time of marriage but not impotent at the institution of the suit a decree must be refused.

Where it is proved that the husband has not been able to perform sexual intercourse even after a fair trial has been given to him by his wife, it must be held that the husband is impotent within the meaning of Section 12 (i) (a).[4]

Impotency simply means inability to perform sexual act. It may be pathalogical or psychological permanent or temporary, complete or partial. Before the Marriage Laws (Amendment) Act, 1976 it was necessary to prove that the respondent was impotent at the time of marriage and continue to be so and till the institution of the proceeding. As the result of the Marriage Laws (Amendment) Act, 1976, it has now to be established by the petitioner that the marriage has not been consummated owing to the impotence of the other spouse. Whatever might be the position at the time of marriage if the marriage is subsequently capable of consummation, be it due to surgical operation or otherwise no decree for annulment of marriage can be granted.[5]

Soon after the marriage during a festival the wife was in a position to take a leave and wrote a letter to her husband about her intending visit to the husband at his place. To this the husband sent a reply asking her not to come as, during the visit of his Boss he would be on a touring day. This is a lame excuse for a husband not to meet a newly wedded wife. The expectation of a husband to enjoy the company and intercourse with his newly wedded wife must be great and intense and office work of a permanent employee would scarcely ever stand in his way so as to bar the wife from paying him a visit Masturbation alone which the husband did not perform before the Doctor to the extent of discharge does not establish that he is not impotent *qua* the wife. It cannot be denied that Masturbation is a second hand method when there is a lack of opportunity of intercourse. The husband had an opportunity which he failed to avail of. The explanation given by him for his failure to perform intercourse was not convincing. As a result husband must be held to be an impotent.[6] Full and complete penetration is an essential ingredient of ordinary

1. *Usman* v. *Inderjit*, AIR 1977 P and H 97.
2. (1958) 2 All ER 77.
3. *Digvijay* v. *Pratapkumari*, AIR 1970 SC 137.
4. *Jagdishkumar* v. *Smt. Sitadevi*, AIR 1963 Punj 114.
5. *Rajendar Pershed Bhardwaj* v. *Smt. Shanti Devi*, AIR 1978 Punj 181 79 Punj LR 514.
6. *Shri Ashok Kumar Ahluwalia* v. *Smt. Nirmal Kant*, 1978 Mat LR 1 Delhi ; 1978 Rajdhani LR 36.

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and complete intercourse. The degree of sexual satisfaction obtained by the parties is irrelevant. Where the respondent wife was suffering from the disease vaginismus and the coitus, or complete penetration was not possible the husband is entitled for a decree of divorce.[1] In matrimonial cases, impotence of the husband has been understood as meaning his incapability to consummate a marriage or to have conjugal intercourse which is one of the objects of the marriage. A sterile person need not necessarily be impotent. In some cases, however, a person may be sterile as well as an impotent. Further impotency may be due to temporary absence of desire for sexual intercourse, timidity, sexual over-indulgence, or other psychological reasons. Where the husband was unable to consummate the marriage and wife continued to be a virgin at the date of petition the burden of proof shifts on husband to prove that he regained potence before filing of the petition.[2] Impotency of the husband amounts to cruelty and wife is entitled for maintenance.[3] By virtue of Section 13 of the Amended Act it is applicable even to pending matters. A wife with artificial vagina of 3" depth and the wife was not capable of sexual intercourse and as such the husband could not consummate marriage as penetration was only for 1" or so. Such imperfect and partial intercourse is not consummation and decree for nullity of marriage must follow.[4] By virtue of Section 39 of the Amending Act, it is applicable even to pending matters. For the purpose of Section 12 (1) (a) it is not necessary for the petitioner to prove that respondent was wholly and totally impotent. It is not necessary for her to show that he is impotent with other women as well.[5] Notice is supposed to give only the bare outlines of the grievances of the party sending the notice. The function of the petition is to give material facts which give rise to the cause of action ; it should not contain evidence of other unnecessary details. The notice or petition are not proper place for minute details and entire evidence is not required to be stated in them. Facts of prolapse of uterus concealed—Marriage is avoidable and is liable to be annulled.[6] Non-consummation of marriage—details of one or two attempts are sufficient. Question of curability of impotency is immaterial.[7] In a decree of nullity on the ground of impotency of husband, the power of the Court to grant another opportunity to husband to prove his capacity to consummate the marriage is not warranted by law. To call upon wife to once again share her bed with her husband who is proved to be impotent would be nothing short of heaping insults upon her.[8] Impotency means incapability for accomplishing the act of sexual intercourse, and in this context, sexual intercourse means not an incipient, partial or imperfect but a normal and complete coitus. Impotency has been distinguished from sterility which may be in some cases accompany

1. *Samar Roy Choudhary* v. *Smt. Snigdha Roy Choudhary*, AIR 1977 Cal 213.
2. *Usman* v. *Inderjet*, AIR 1977 P and H 97 (DB).
3. *Siraj Mohamad Khan* v. *Hafizunnissa*, AIR 1981 SC 1972.
4. *Smt. Sushila Aggarwal* v. *Vijay Kumar Aggarwal*, AIR 1981 Delhi 272.
5. *Smt. Swarna* v. *G. M. Acharya*, AIR 1979 AP 169.
6. *Raghunath Gopal Daftardar* v. *Sau Vijaya Raghunath Daftardar*, AIR 1972 Bom 132 held no longer good law in view of amendment in 1976.
7. *P. Appellant* v. *K. Respondent*, AIR 1982 Bom 400.
8. *Usman* v. *Inderjit*, AIR 1977 P & H 97 (DB).

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impotency but is not necessarily associated with it. The two expressions denote lack of two different powers. A person may be incapable of accomplishing the sexual act and yet be capable of procreating. Conversely also a person may be incapable of procreating and yet be capable of accomplishing the sexual act. The cause of impotency may be in the malformation or structrual defect in the parts ; in the functions, resulting in imperfect erection or premature ejaculation ; in diseases, local or general or in the mind, manifesting itself a repugnance for the sexual act, fear, lack of confidence, etc. In some cases a person may be capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case he must be regarded as impotent in relation to that particular individual regardless of his potency in general.[1] In a petition for restitution of conjugal rights filed by husband, the wife raised the defence of impotency of the husband and the husband alleged sexual intercourse with his wife. On medical evidence wife having her hymen intact and her vagina admitting only one finger and the husband having normal generative organ. It was held that though outwardly husband appeared potent, he was impotent towards his wife and hence decree for nullity was passed.[2] To consummate the marriage complete sexual intercourse must take place otherwise dissolution of marriage under Section 12 on the ground of impotency must follow.[3] The parties to the marriage were physically fit but no act of coitus could take place it was held that on the facts and circumstances, that wife had uncontrollable aversion to allowing coitus to husband. The case belonged to rare variety of frigidity *quoedhanc*.[4] The wife claimed a decree of nullity of marriage alleging her husband to be impotent. The doctor testing husband neurologically and by stimulation. The test are not final to conclude impotency. The husband having normal health and genital organs capable of performance of marital obligation. The wife was also admittedly not a virgin. It was held that the marriage has been consummated and the husband cannot be declared to be impotent.[5] Inability to perform sexual intercourse even after fair trial given by wife, the husband should be held to be impotent.[6] The individuals generally potent but impotent with respect to his own spouse. He is impotent for the purpose of this Act.[7] So far as impotency is concerned the evidence of expert medical testimony is necessary. The mere fact that spouse feels no charm in marriage or that she is inclined towards religious life is not conclusive.[8] Impotency to be a valid ground of defence, it should be continuous from the date of marriage upto the date of proceeding.[9] Impotency is incapacity for sexual intercourse or when coitus is difficult or painful. The presence or absence of uterus is quite immaterial to the question whether a woman is impotent or not.[10] The impo-

1. *Jagdish Lal* v. *Smt. Shyama Madan & others*, AIR 1966 All 150.
2. AIR 1966 All 150 : 1965 All LJ 453.
3. AIR 1962 AP 151 (DB).
4. *Smt. Shantibai* v. *Tarachand*, AIR 1966 MP 8 (DB).
5. 1963 MPLJ (Notes) 92.
6. AIR 1963 Punj 114.
7. AIR 1970 J & K 130.
8. *Jayaraj Antony* v. *Mary Seeniammal*, AIR 1967 Mad 242 : 79 Mad LW 640 (FB).
9. *K. V. Revanna* v. *Suseelamma*, AIR 1967 Mys 165.
10. *Samar Som* v. *Smt. Sadhana Som*, AIR 1975 Cal 413 ; 1975 Hindu LR 426 (DB).

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tency contemplated in this section does not signify sterility but contemplates incapacity to have normal sexual intercourse.[1] In the annulment of marriage on the ground of impotency wife could be granted maintenance till she remains unmarried.[2] A person charged of impotency cannot be compelled to undergo medical examination.[3] In a petition by wife under this section, the wife offered that if the husband was found potent on medical examination her application should be dismissed. The medical report about the husband being potent, was filed in Court. It was held that she has statutory right to prove her husband's impotency and hence cannot be forced to abide by her offer and the offer being *malafide* or otherwise can be considered at the time of deciding her application on merits by trial Court.[4] When the husband is able to get erection and penetrate wife fully, the consummation is complete. No impotency despite the fact that their could be no emission of semen in the wife's body.[5] The fact that one of the spouses is comparatively over-sexed does not warrant the inference that the other spouse is impotent.[6] When the marriage of the wife is against her will her refusal to submit to intercourse and no medical examination to find out if she was physically or psychologically impotent no decree under Section 12 could passed as no inference of impotency can be assigned.[7] The impotency means incapacity to have conjugal intercourse and it has nothing to do with capacity to procreate children. The court can grant relief even if the spouse is found to be impotent only in the relation to the other spouse.[8]

3. Lunacy and idiocy.—The expression 'idiot' is not defined in the Act. It must be understood in its ordinary significance. It does not contemplate a person merely of weak intellect, in the sense that he is not upto the ordinary standard of human intelligence, or endowed with the capacity to manage his affairs properly. In the present context it means a person so deficient in mind as to be permanently incapable of rational conduct. Idiocy is congenital. It must be shown to have been complete and absolute before it can be held that a person was incompetent to marry as being incapable of understanding the meaning of marriage. An idiot is one born without any glimmering of reason and to distinguish from a lunatic who is one that had understanding but has temporarily or permanently lost use of reason by disease, grief or other cause. As a general rule, a marriage contract will not, however, be decreed void on the ground of want of mental capacity unless there was at the time of marriage such a want of understanding in the party as to render him or her incapable of understanding the obligations and the nature of the contract and whatever might have been the condition of the party's mind at other times, its condition at the time of the marriage itself must govern the question of capacity. Under Section 12 (1) (b) read with Section 5 (ii) a marriage becomes voidable and may be annulled. If at the time of marriage the respondent was incapable

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1. AIR 1971 MP 168.
2. *Soumyanarayana* v. *Jayalakshmi Ammal*, AIR 1975 Mad 196.
3. *Smt. Revamma* v. *Sri Shanthappa*, AIR 1972 Mys 157.
4. 1975 Hindu LR 22 (Punj).
5. *Smt. Chanchal Kumari* v. *Kewal Krishan*, AIR 1972 Punj 474 : 74 Punj LR 767.
6. *Mrs. Rajinder Kapur* v. *Man Mohan Singh*, AIR 1972 Punj 142.
7. 1975 WLN (UC) 193.
8. *Smt. Laxmi Devi* v. *Babu Lal*, AIR 1973 Raj 89.

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of giving consent due to unsoundness of mind.[1] Though the respondent was capable of giving valid consent that person was suffering from mental disorder of such kind and degree as to render that person unfit for marriage or begetting children or the respondent had been subject to recurrent attacks, of insanity or epilepsy.[2] A marriage of a person subject to temporary or periodical insanity, if contracted during a lucid interval, is valid whatever might have been the condition of his mind either before the marriage or after it. See a lucid exposition of the position with reference to annulment of marriage on the ground of insanity of one of the spouses at the time of the marriage in *Munishwar Datt* v. *Indra Kumari*.[3] Subsequent recovery of the person from unsoundness of mind does not affect the question of the validity of the marriage.[4] Medical evidence, though it may not in all circumstances be a determining factor, is never theless a most important element of evidence. Both pre-nuptial and post-nuptial physical or mental state of the respondent may be considered to determine the respondent's mental state at the time of the marriage.[5] 'Lunatic' means person of unsound mind. The standard of proof as to insanity is not that which is required in a criminal case. Court need only be satisfied on balance probability.[6] Epilepsy *per se* is not a ground for annulment. Epileptic wife is not an '*Akanya*' meaning an impotent woman, and, therefore, here epileptic condition *per se* would not be a ground for granting a decree of nullity. It can not also be said that an epileptic wife is not capable of performing religious and other oblations.[7] In proof of lunacy, medical evidence may not always be given in all cases or may not be in all circumstances a determining factor but nevertheless it is one of the most important elements of evidence. Even in a case of intermittent insanity many factors have to be considered including both pre-nuptial and post-nuptial physical and mental state of mind of the wife or the husband (as the case may be) to determine whether he or she suffered from lunacy at the time of marriage.[8] In affirming the decree of nullity of marriage on the ground that the wife was an idiot it was held where the wife aged 17 years did know the difference between a boy and girl, 'Amavasya' and 'Poornima' or a living and a dead person apart from the fact that she did not know what consummation of marriage or married life was, she could not be said to be a mere imbecile or simpleton. The medical opinion is of help but is not conclusive.[9] The party alleging has to prove not merely perversion of understanding but total absence of reasoning from birth. In the absence of any allegation of permanent unsoundness of mind of the spouse in question, the onus is firmly cast on the petitioner who challenges the validity of the marriage on the ground of lunacy of the other spouse and it is his duty to adduce such materials from which a reasonable inference may be drawn as to the lunacy of the party and the Court's conscience must be satisfied

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1. *Amina Roy* v. *Prabodh Mohan Roy*, AIR 1969 Cal 304; *Pronab Kumar* v. *Krishna*, AIR 1975 Cal 109; *Mt. Titly* v. *Jones*, AIR 1934 All 273.
2. *Bavidevi* v. *Banerjee*, AIR 1972 Delhi 50.
3. ILR (1963) 2 Punj 263 : AIR 1963 Punj 449.
4. *Pronab Kumar* v. *Krishna*, AIR 1975 Cal 109.
5. *Kartik Chandra* v. *Manjurani*, 78 Cal WN 36 : AIR 1973 Cal 545.
6. *Smt. Anima Roy* v. *Prabodh Roy*, AIR 1969 Cal 304 (DB).
7. ILR (1967) Guj 822 : 8 Guj LR 918.
8. *Kartik Chandra Banerjee* v. *Smt. Manjurani Banerjee and another*, AIR 1973 Cal 545 (DB).
9. (1973) 2 AP LJ 414.

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before such a decree annulling the marriage be passed.[1] The subsquent attack of insanity to one of the spouses who was otherwise sane at the time of marriage, cannot make the said marriage in nullity under Section 12 (1) (b). Where the alleged disease is Schizophrenia, whether, it is curable or not does not save the case in which one of the parties of the marriage was suffering from Schizophrenia at the time of marriage.[2] The medical opinion in favour of sanity do not contemplate adverse inference against sanity merely because expert who was not examined.[3] The concealment of factum of suffering of wife from incurable Schizophrenia falls under Section 12 (1) (c) and annulment can be decreed.[4]

4. Consent by force or fraud.—Where in a petition under Section 12 the husband avers that there was fraudulent misrepresentation at the time when "The petitioner gave his consent to the proposal for marriage", and there is no allegation that there was fraud at the time of the solemnization of marriage, the petition does not disclose any cause of action against the wife, the marriage cannot be invalidated.[5] The definition of fraud even in Section 17, Contract Act, would not be applicable to a marriage under the Hindu Law, because a Hindu marriage is a sacrament and not a contract. The word 'fraud' as a ground for annulment of the marriage under Hindu Law is limited only to those cases where the consent of the petitioner at the solemnization of the marriage was obtained by some sort of deception. It is not used in a general way and on every misrepresentation or concealment, the marriage can not be dissolved. The fact that the respondent was of bad character before the solemnization of the marriage cannot be a ground for annulment of marriage, because there is a specific clause (d) of this very section dealing with this matter. Section 12 (1) (a) means that the Legislature did not intend that the past conduct of the respondent, except what is mentioned in clause (d), should become a ground for the dissolution of the marriage. Where the petitioner alleged in his annulment petition that he had given his consent at the time of the solemnization of the marriage of the assurance of the respondent's father that the respondent was a virgin and her character was unblemished but that soon after the marriage he came to know that the child was born to her before her marriage. It was held that the allegations made in the petition did not come within the meaning of 'fraud' as used in Section 12 (1) (c) of the Act and therefore the petition was liable to be dismissed as not disclosing any cause of action.[6] There can be no dispute with the proposition that the plea of fraud in matrimonial cases is to be proved beyond reasonable doubt and no finding can be recorded on mere pre-ponderance of evidence and probabilities of the case, but it does not mean that the Court while appreciating the direct evidence cannot take into consideration the probabilities of the case set up by the parties and the appending circumstances.[7] The concurrent findings of lower Court on construction of letters and on other evidence that consent of petitioner husband to marriage was not obtained by fraud is essentially of facts and is binding in

1. *Pronab Kumar Ghosh* v. *Krishna Ghosh*, AIR 1975 Cal 109 (DB).
2. *Smt. Khanta Moni Saha* v. *Shyam Chand Pramanick* (*Saha*), AIR 1975 Cal 113 (DB).
3. *Kartik Chandra Banerjee* v. *Smt. Manju Rani Banerjee and another*, AIR 1973 Cal 545 (DB).
4. *Smt. Asha Srivastava* v. *R. K. Srivastava*, AIR 1981 Delhi 253.
5. AIR 1959 Cal 775.
6. AIR 1964 Punj 359.
7. *Gurmeet Kaur* v. *Narinder Singh*, 1978 Rev LR 385 ; 80 PLR 507.

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second appeal.[1] The fraud does not mean any fraudulent representation or concealment. The test is whether there is a real consent to solemnization of marriage. The non-disclosure or concealment of curable epilepsy does not amount to fraud within Section 12 (1) (c).[2] The threat to commit suicide is coercion.[3] The fraud or misrepresentation must be practised at the time of marriage and not at the time of betrothel.[4] When the consent was obtained before marriage is solemnized, the case falls under sub-section (1) (c) under which the proof that consent was obtained by force or fraud at the time of marriage is not necessary.[5] Where the father represented to his wife within the hearing of the appellant, his daughter, who was *sui juris* that the proposed bridegroom was a young man, although in fact he was of advanced age and the appellant believing the representation gave her consent to the marriage. Since the appellant was under veil she could not see her husband at the time of marriage so as to withdraw her consent, hence the appellant was entitled to dissolution of marriage.[6] The failure to disclose *suo motu* the past unchastity of his would be wife, by her relations to the husband or his relations does not amount to obtaining consent of the husband to marriage by fraud.[7] In absence of particulars of fraud in substantive petition mere mention of fraud or fraudulent act of concealment is ineffective.[8] The consent obtained by misrepresentation or false horoscope before marriage does not vitiate solemnization by fraud or force. The substitution of horoscope is no ground for annulling marriage.[9] The concealment of fact by the wife from husband that she was suffering from venereal disease did not amount to 'fraud'.[10] The concealment of the fact that the appellant had been once married to another women cannot be a ground for annulment of the marriage.[11] Where evidence of petitioner husband regarding procurement of his consent to marriage by coercion could not be believed as being extremely improbable in view of the love affairs with the wife before marriage and where he had cohabited with wife after marriage after alleged coercion had ceased to exist the husband's under petition under Section 12 (1) (c) of the Act could not be sustained. The fact that wife contracted second marriage during pendency of the husband's appeal against adverse order passed in his petition under Section 12 (1) (c) did not establish that his consent to marriage was obtained by force.[12] Where husband alleged in his petition under Section 12 that he was shown a girl at Bombay by her maternal uncle which was different from the one to whom he was actually married in Punjab but failed to allege that a different girl had been shown to

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1. 1969 Mah LJ 798 : 71 Bom LR 569 : AIR 1970 Bom 312.
2. *Raghunath* v. *Vijaya*, 1972 Mah LJ 110 : AIR 1972 Bom 132 : 73 BLR 840.
3. *Smt. Purabi Banerjee* v. *Basudeb Mukherjee*, AIR 1969 Cal 293.
4. ILR 1967 Guj 822 : 8 Guj LR 918.
5. *Babui Panmato Kuer* v. *Ram Agya Singh*, AIR 1968 Pat 190.
6. *Ibid.*
7. *Surjit Kumar Hari Chand* v. *Smt. Raj Kumari*, AIR 1967 Punj 172.
8. *Kartik Chandra Banerjee* v. *Smt. Manjurani Banerjee and another*, AIR 1973 Cal 545 (DB).
9. 1975 Ker LT 216 : ILR (1975) 1 Ker 469.
10. *Madhusudan* v. *Smt. Chandrika*, AIR 1975 MP 174 ; 1975 MPLJ 381.
11. *Rajaram Vishwakarma* v. *Deepabai*, AIR 1974 MP 52 (DB) ; 1973 MPLJ 626.
12. 1975 Hindu LR 382 (Punj).

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his mother and later on to his brother and sister-in-law in Punjab sometime before marriage and approved, it is difficult to hold that fraud was played on all these occasions. Further held that where marriage had been performed according to religious rites of the parties it is complete and merely because it was not consummated it cannot be said that fraud had been played on the husband-petitioner.[1] A single act of sexual intercourse by a spouse who had been fraudulently invigled into a marriage by fraud and impersonation by other spouse, would not amount to total condonation of fraud and inpersonation so as to bar petition for annulment of such voidable marriage under Section 12.[2] The fact of annulment of first marriage on the ground of unsound mind was concealed at the time of second marriage, then marriage can be annulled under Section 12 (1) (c). If the wife is suffering from Schizophrenia intermittently but to such extent that husband could not reasonably live with her, divorce can be granted. It is not necessary to prove that mental disorder emited at or before marriage.[3]

5. Pregnancy of respondent at the time of marriage.—Under Section 12 of Hindu Marriage Act in order to sustain a petition the only things that the petitioner has to prove are (1) That at the time of marriage, the wife was pregnant ; (2) That the pregnancy was by some person other than the petitioner ; (3) That the petitioner was ignorant of the pregnancy at the time of marriage ; (4) That the petition was filed within one year from the date of marriage ; and (5) No marital intercourse has taken place since the discovery by the petitioner of the respondent's pregnancy. The burden lies on the petitioner to prove pregnancy of the respondent by some other person.[4] The requirement as to filing the petition within one year of the marriage is mandatory.[5] Since the requirement is the condition precedent and not a period of limitation Section 5, Limitation Act cannot be invoked.[6] It would seem that even where the husband's right under the section has been concealed from him by the fraud of his wife during the concerned period, a petition under Section 12 (1) (d) will not be competent thereafter.[7] If it is doubtful whether the pregnancy was by the petitioner or by somebody else by reason of the petitioner and others having had intercourse with the respondent prior to the marriage, the benefit of doubt must be in favour of the validity of the marriage for in such circumstances it is not possible to say that the respondent was pregnant by some person other than the petitioner. Again if the circumstances proved do not clearly show that the petitioner was ignorant of the fact of the pregnancy at the time of the marriage, and it is doubtful if he knew about it or not, the burden of proof that he did not know about the pregnancy must be thrown on him, the presumption being that he did know about the pregnancy at that time. Again, if marital intercourse was shown to have taken place

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1. 1975 Hindu LR 36 (Punj).
2. *Bikka Singh* v. *Smt. Mohinder Kaur*, AIR 1981 P & H 391 (DB).
3. *Smt. Kiranbala* v. *Bhairo Prasad Srivastava*, AIR 1982 All 242.
4. *Nandkishore* v. *Munnibai*, AIR 1979 MP 45 ; *Mahendra* v. *Sushila*, AIR 1965 SC 364 ; *Nihsit Kumar* v. *Anjali Biswas*, AIR 1968 Cal 105.
5. *Rangaswamy* v. *Nagamma*, AIR 1973 Mys 178 : (1972) 2 Mys LJ 256 ; *Nanikaram* v. *Draupadiben*, AIR 1974 Guj 111 ; (1973) 14 GLR 620.
6. *Vellinayagi* v. *Subramanian*, AIR 1969 Mad 479 ; *Nandkishor* v. *Munnibai*, supra.
7. *Chaplin* v. *Chaplin*, (1948) 2 All ER 408.

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between the petitioner and the respondent after the discovery by the petitioner of the pregnancy—a circumstance which would be fatal to the maintainability of the petition—the only way in which course which was had was not with the petitioner's consent, out that he had been forced to it by threat or duress overpowering his will.[1] Where it was found that the wife had given birth to a mature child within 167 days after the marriage, it was held in the circumstances of the case that the burden of proving that the child was the child of the husband was on the wife.[2] This case also holds that giving of blood samples should not be compelled for test of paternity of the child.

Where the medical evidence clearly established that the respondent was pregnant since long before the date of the wedding, the testimony of the doctor who was expert in mid-wifery cannot be rejected on the ground that she had not specialised in gynaecology.[3] In order to appreciate the evidence on record two crucial dates must be kept in mind, namely, the date of the marriage between the parties and the date on which the respondent delivered a son. It was nobody's case that the appellant had access to the respondent before the date of the marriage. The medical evidence clearly establishes the fact that the respondent was pregnant since long before the date of the wedding and if that be so it must be the result of sexual relations not with the appellant but with some person other than the appellant. The High Court was, therefore, clearly in error in relying upon passages occurring in text-books of medical experts dealing with exceptional cases and rejecting the positive and clear evidence that was led by the appellant in this regard. The appellant's marriage with the respondent is declared to be a nullity. In a petition for annulment of marriage no issue under Section 12 (2) (c) (i) and therefore no evidence on the point could be led. The High Court held rightly and remanded the issue.[4] The Court can base its decision on admission of parties. The trial Court's finding on admission of wife and other evidence that the child was conceived by petitioner before marriage, then it is not right for High Court to remit issue for recording finding on question whether child was conceived after marriage.[5] The normal child born after normal delivery of 171 days after first coitus between husband and wife then normally it should be held that child was not of the husband. Fully matured child born after 212 days of marriage does not definitely lead an inference that the wife conceived baby necessarily prior to actual date of marriage.[6] When the child was born after 232 days of marriage and medical examination of mother during the pregnancy gave different opinions by doctor, no inference of illegitimacy can be drawn.[7] The past unchastity is not made a ground for annulment of marriage.[8]

6. Limitation and condition.—The marriage was solemnized before Hindu Marriage Act came into force and petition for annulment was filed on

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1. *Susheela* v. *Nanavati*, AIR 1960 Bom 117 ; *Sivaguru* v. *Saroja*, AIR 1960 Mad 216.
2. *Nishit Kumar* v. *Anjali Biswas*, AIR 1968 Cal 105.
3. *Baldev Raj* v. *Urmila Kumari*, AIR 1979 SC 879.
4. *Mahindra Mani Lal Nanavati* v. *Sushila Mahendra Nanavati*, AIR 1965 SC 364.
5. *Ibid.*
6. AIR 1970 Mad 211 (SB) : 83 Mad LW 20.
7. 1968 Cur LJ 365 (Punj).
8. *Surjit Kumar Harichand* v. *Smt. Raj Kumari*, AIR 1967 Punj 172.

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11-6-1956 when the Court reopened after summer vacation. Section 10 of General Clauses Act is not applicable to proceeding under Section 12 (1) (d) of the Act as compliance with sub-section (2), Clause (b) is a condition precedent to the success of the application and as such the petition is not maintainable.[1] In order that the wife should be entitled to a decree for annulment of marriage, it is necessary that the wife must establish husband's impotency at the time of marriage and until institution of proceedings. Where a wife applied under Section 12 (1) (a) after 7 years before alleging that she went to her husband's house two or three years after marriage and found him impotent and no evidence of impotency at the marriage was led and the proceeding was started after four years after alleged discovery. The wife's petition could not succeed.[2] Unnecessary or improper delay in instituting the proceeding under Section 12 is undoubtedly a good ground for refusing to grant any relief under Section 12 of the Act. That much is provided in Clause (d) of sub-section (1) of Section 23 of the Act. No hard and fast rule can be applied in deciding the question. It is worth remembering that the Act has not prescribed any period of limitation for presenting an application under Section 12 of the Act. In considering whether there was unnecessary or unreasonable delay in seeking the relief, the conditions of the society in which the parties lived and traditions of the families to which they belong cannot be ignored. The Hindu Society looked with disfavour dissolution of marriages. It was considered as something sinful. It requires courage to face the public odium. Even today considerable sections of the Hindu Society look with disfavour the idea of dissolving a marriage which fact can be taken notice of judicially.[3] Even if alleged ground for annulment of marriage exists at the time of marriage and continues till the institution of proceeding, Court must consider its existence at the date of granting decree.[4] If the husband or the wife, as the case may be, after the fraud was discovered lived together for whatever period as wife and husband is full consent, it would be sufficient for not entertaining the petition for annulling the marriage.[5] When the parties are Hindus belonging to middle class the marriage ideology of the class cannot be ignored while granting relief. The husband was unable to perform sexual act because of inherent sexual weakness and debility, the delay in the circumstances is no bar to grant the relief.[6] Section 10 of General Clauses Act (1897) has no application in deciding the petition under Section 12 (2) Clause (d) (ii).[7]

In proceedings under this Act the court can arrive at the satisfaction contemplated by Section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act, and that it is quite competent for the court to arrive at the necessary satisfaction even on the basis of the admis-

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1. *Savlaram* v. *Yashodabai*, AIR 1962 Bom 190 : 64 BLR 27 : 1962 NLJ 116 (DB).
2. 1962 MPLJ (Notes) 312.
3. *B.* v. *R.*, AIR 1968 Delhi 79.
4. *A.* v. *B.*, ILR 1967 Guj 122 : 8 Guj LR 918 : AIR 1967 Punj 152.
5. *Raghunath Gopal Daftardar* v. *Sau Vijaya Raghunath Daftardar*, AIR 1972 Bom 132 : 73 PLR 840 : 1972 Mah LJ 110.
6. *Mrs. Rita Nijhawan* v. *Shri Bal Krishna Nijhawan*, AIR 1973 Delhi 220 : ILR (1973) 1 Delhi 944 (DB).
7. *Nanikram Gellaram* v. *Smt. Drupadiben*, AIR 1974 Guj 111 ; AIR 1973 Mys 178 (DB).

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sions of the parties alone. Admissions are to be ignored on grounds of prudence only when the Court, in the circumstance of a case, is of opinion that the admission of the parties may be collusive. If there be no ground for such a view, it would be proper for the Court to act on those admissions without forcing the parties to lead other evidence to establish the facts admitted, unless of course, the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted.[1]

7. **Cohabitation.**—The second ground embodied in clause (ii) of Section 12 (2) (a) which prevents a petition for nullity of marriage brought about by force or fraud is the parties living together as husband and wife, in spite of their knowledge of the fraud or the force employed. This clause or condition does not depend upon the lapse of any time after the discovery of the vitiating circumstance. If the discovery is made even a day prior to the living together as husband and wife which in the context means having sexual intercourse, the petition deserves to be dismissed. The principle underlying this condition appears to be the principle gatherable from the idea of condonation. It it always open to the parties brought together in a marriage despite the force or fraud employed for bringing it about, to stand by that alliance even after their knowledge of the vitiating circumstance and if they approbate the alliance by living together as husband and wife, it will no longer be open to them to reprobate it by filling a petition for a decree of nullity. Such living together as husband and wife must be with full consent of the spouse on whom the fraud or force has been exerted. Where the husband and wife had lived together after the discovery of the fraud, the period of such living is not relevant for purposes of the condition laid down in Section 12 (2) (a) (ii).[2] If on discovery of the fraud by one of the spouses, he or she is prevented from going away and is forced despite his or her will to continue cohabitation, that would not prevent him or her from filling and succeeding in the petition for nullity of marriage on the ground of condonation or acquiesance,

8. **Evidence and burden of proof.**—An order allowing a petition under Section 12 (c) of the Act on the ground that respondent and her counsel were absent cannot be sustained. In proceedings under the Act, whether defended or not, the Court must be satisfied that the ground for granting relief exists. It is the duty of Court in every case where it is impossible to do so consistently with the nature and circumstances of the case to make every endeavour to bring about reconciliation between the parties.[3] A petition for annulment of marriage on the ground that wife was insane where no cogent evidence was produced to establish that at the time of marriage wife was of unsound mind or was suffering from some mental disorder. The petition was held to be liable to be dismissed.[4] In a petition for dissolution of marriage on the ground of adultery the standard of proof of adultery in

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1. *Mahendra Manilal Nanavati* v. *Sushila Mahendia Nanavari*, (1964) 7 SCR 267 : 1965 SCD 95 : AIR 1965 SC 364 : (1965) 6 SCJ 788 : 66 BLR 681 : 1965 Mah LJ 365 : 1965 MPLJ 509.
2. *Raghunath* v. *Vijaya*, ILR (1972) Bom 511 : AIR 1972 Bom 132.
3. *Rudramma TH* v. *Somshekharappa HNM*, (1977) 1 Kant LJ 318 (DB).
4. *Smritikana Bag* v. *Dilipkumar Bag*, AIR 1982 Cal 547 (DB).

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a petition for divorce is not as strick as in a criminal case and the proof beyond reasonable doubt is not required.[1] Adultery has to be proved mainly by circumstancial evidence and cannot be proved mainly by direct evidence. The burden of proof is on person who made the allegations. The levelling of allegations of adultery without proper foundation and basis would constitute mental cruelty on the other spouse so as to anable that spouse to seek divorce on the ground of cruelty.[2] In a petition under Section 12 (1) (d) though the defendant has, in her written statement stated that she was pregnant at the time of marriage, the Court must require the petitioner to prove beyond reasonable doubt that she was so pregnant and that she was pregnant by semeone other than the petitioner. The satisfaction which the court has to arrive at in proceedings under this Act must be satisfaction beyond all reasonable doubt.[3]

The ground of annulment of marriage on the ground of pregnancy *per alium* is a species of fraud perpetuated by a spouse, which would invalidate the marriage. Consequently, it is for the petitioner husband who seeks annulment on this ground to establish that the fraud is present, and he must affirmatively show that all the conditions set forth in the section are satisfied. It would not be sufficient for a petitioner merely to show the existence of pregnancy *per alium* at the time of marriage. There is no onus of proof upon the respondent, (the wife), in such cases, with regard to any of the essential conditions upon which the husband can obtain a decree of nullity of marriage. It is for the husband, on the contrary to satisfy the Court that these conditions are fulfilled.[4] As a general rule the burden of proof on the question of impotency of the respondent is upon the petitioner.[5] The impotency of the respondent being a peculiar matter within the exclusive knowledge of the spouses, *proof aliunde* of the infirmity is always difficult, but where a decree of nullity on the ground of the respondent's malformation is sought, the relief need not be granted unless the existence of incurable malformation which prevents the sexual intercourse is spoken to by the medical man who has examined the respondent.[6] It is not competent, in the absence of provision, to any party to compel the other party alleged to be impotent to submit to medical examination.[7] The Court no doubt has got the power to order the medical examination of the respondent but this power has got to be used with great caution, due regard being had to the protection necessary to be given against violence to natural delicacy and sensibility especially of the female spouse. No doubt, if the respondent refuses to submit herself or himself to the medical examination necessary to corroborate the evidence of the petitioner, it is open to the Court, to draw an

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1. *Binode Anand Lakra* v. *Smt. Belulah Lakra*, AIR 1982 Pat 213 (SB).
2. *Smt. Swayamprabha* v. *A. S. Chandrashekhar*, AIR 1982 Kant 295 (DB).
3. AIR 1960 Bom 117 (DB) : 61 BLR 431 : 1960 Nag LJ 145.
4. 73 Mad LW 224 : 1960 Mad WN 57 : AIR 1960 Mad 216 (217, 218).
5. *Rajendra* v. *Shantidevi*, AIR 1978 P & H 181.
6. *Laxmidevi* v. *Babulal*, AIR 1973 Raj 89 ; *Samar* v. *Snigdha*, AIR 1977 Cal 213 ; *M* v. *S*, 1963 Ker LT 315 ; *Ganeshji* v. *Hahtulabai*, (1967) 8 Guj LR 966 ; *Rajendra* v. *Shantidevi*, AIR 1978 P & H 161.
7. *Revamma* v. *Shanthappa*, AIR 1975 Mys 136.

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adverse inference against the refusing party, but it is not bound to do so.[1] The husband's admission of impotency is sufficient proof and no further evidence is needed.[2] If the respondent confesses to non-consummation and refuses to undergo medical inspection decree of nullity may be granted.[3] In a proceeding under this section where the evidence of one spouse alone is available there is no need for corroboration if such evidence is reliable.[4] Medical certificates do not prove themselves and must be strictly proved by the doctor issuing them, who must state whate tests he carried out for arriving at his conclusion and must able to stand cross-examination and convince the Court about the correctness of the said conclusion.[5] Where the evidence establishes the possibility of only an incipient or imperfect coitus, impotency must be held to have been proved.[6] The burden of proof that the respondent was of unsound mind at the time of marriage is upon the petitioner. The burden then shifts to the respondent to show that when the marriage contracted he or she was in a lucid interval and therefore the marriage was valid. The latter burden is a very serious and heavy burden indeed, and the question of its discharge must necessarily depend upon very cogent and clinching evidence regarding the lucidity of the mental condition at the time of the marriage. A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility.[7] The existence of first wife at the time of performance of the second marriage need not be established by direct evidence and that fact may be inferred from other facts proved in the case.[8]

13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

[9][(*i*) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse ; or

(*ia*) has, after the solemnization of the marriage, treated the petitioner with cruelty ; or

(*ib*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or]

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1. *Birendrakumar* v. *Hemlata*, 24 CWN 914 ; *Bipinchandra* v. *Madhuri Ben*, AIR 1963 Guj 250 ; *Mitra* v. *Mitra*, AIR 1971 Cal 1 ; *Maragathamani* v. *Ebenezer*, AIR 1971 Mad 27 ; *Mathuram Augustine* v. *Vijayarani*, (1979) 2 MLJ 301 (FB).
2. *Sucharita* v. *Rajendar*, (1976) 77 Punj LR 79.
3. *Arunkumar* v. *Sudhansubala*, AIR 1962 Ori 65.
4. *Swarnabahan* v. *Rashmikant*, AIR 1970 Guj 43.
5. *Gonsalves* v. *Iswariah*, AIR 1953 Mad 848.
6. *Clarke* v. *Clarke*, (1943) 2 All ER 540.
7. *Yuvraj Digvijay Singh* v. *Yuvrani Pratapkumari*, (1969) 2 SSC 279 : AIR 1970 SC 137 : 1969 SCD 1110.
8. *Mst. Rajulabai* v. *Suka Dukali*, AIR 1972 MP 57 (DB).
9. Clause (i) Subs. by the Act No. 68 of 1976.

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(*ii*) has ceased to be a Hindu by conversion to another religion ; or

[1][(*iii*) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

(*a*) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia ;

(*b*) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment ; or]

(*iv*) has, [2][* * * *] been suffering from a virulent and incurable form of leprosy ; or

(*v*) has, [2][* * * *] been suffering from venereal disease in a communicable form ; or

(*vi*) has renounced the world by entering any religious order ; or

(*vii*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive ; [3][* * *]

[4][*Explanation.*—In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly] ;

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1. Clause (iii) Subs. by the Marriage Laws (Amendment) Act, 1976.
2. The words (for a period of not less than three years immediately preceding the presentation of the petition) omitted by the Marriage Laws (Amendment) Act, 1976.
3. The word "or" omitted by Hindu Marriage (Amendment) Act, 1964, Section 2, w.e.f. 20-12-1964.
4. Explanation inserted by the Marriage Laws (Amendment) Act, 1976.

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(*viii*) [1][* * *]

(*ix*) [1][* * *]

[2][(1-A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(*i*) that there has been no resumption of cohabitation as between the parties to the marriage for a period of [3][one year] or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties ; or

(*ii*) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of [3][one year] or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

(*i*) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner :

Provided that in either case the other wife is alive at the time of the presentation of the petition ; or

(*ii*) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or [4][bestiality ; or]

[5][(*iii*) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974), [or under the corresponding Section 488 of the Code of Criminal

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1. Clauses (viii) and (ix), deleted by Act No. 44 of 1964.
2. Sub-section (1-A) inserted by Act 44 of 1964, Section 2, w.e.f. 20-12-1964.
3. Words in brackets subs. by Marriage Laws (Amendment) Act, 1976.
4. Subs. by the Marriage Laws (Amendment) Act, 1976.
5. Clauses (iii) and (iv) inserted by the Marriage Laws (Amendment) Act, 1976.

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Procedure, 1898 (5 of 1898)], a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards ; or

(*iv*) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.]

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

SYNOPSIS

1. General.
2. Divorce.
3. Special Marriage Act and dissolution of Hindu marriages.
4. Voluntary sexual intercourse.
5. Proof of sexual intercourse.
6. Scope and object.
7. Cruelty—General.
   - —(a) Actual or threatened physical violence.
   - —(b) Verbal abuse and insults.
   - —(c) Excessive sexual intercourse.
   - —(d) Refusal of intercourse.
   - —(e) Neglect.
   - —(f) Communication of venereal disease.
   - —(g) Drunkenness and use of drugs.
   - —(h) Refusal to speak.
   - —(i) Forcing association with improper person.
   - —(j) False charge of immorality against the wife.
   - —(k) Ill-treatment of children.
   - —(l) Wife's association—Suspicion.
8. Cruelty during separation.
9. Cruelty by refusal to have children.
10. Cruelty by words.
11. Recent case-law.
12. Cruelty by deception.
13. Incapacity to work or provide money or home, when cruelty.

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14. Wife's cruelty—Perspective and illustrative cases.
15. Burden and standard of proof in cruelty cases.
16. Condonation of cruelty.
17. Desertion.

—(i) Meaning and ingredients.
—(ii) Intention to desert or abandon.
—(iii) Commencement of desertion.
— (iv) Cause for desertion.
—(v) Desertion must be without consent or against the wish of the petitioner.
—(vi) Constructive desertion.
—(vii) Wilful neglect and desertion.
—(viii) Desertion must be for a continuous period of not less than two years.
—(ix) Termination of desertion.
—(x) Defence to action on ground of desertion.
—(xi) Effect of condonation of desertion.
—(xii) Burden and standard of proof.

18. Ceased to be a Hindu by conversion.
19. Incurably of unsound mind.
20. Leprosy.
21. Veneral disease.
22. Renunciation of the world by entering any religious order.
23. Clause (vii) : "has not been heard of as being alive for a period of seven years or more".
24. Clause (i) of sub-section (1-A) : No resumption of cohabitation after judicial separation or decree of restitution of conjugal rights.
25. Clause (i) of Section 13 (2) : Husband remarrying.
26. Rape, sodomy or bestiality.
27. Non-cohabitation after decree for maintenance.
28. Repudiation of marriage by wife married before attaining 15 years.
29. Practice, procedure, jurisdiction and duty of Court.
30. Evidence and burden of proof.
31. Court-fees.

1. General.—This section provides for divorce and in certain cases judicial separation can be followed by a deree of divorce.

2. Divorce.—Marriage under textual Hindu Law was primarily and essentially a sacrament. It was regarded not only as a union of two bodies but also of the souls in them. The textual Hindu Law did not permit dissolution of marriage. The Hindu Marriage Act created apropos marriage a relation and status, not defined by contract but by law. It has provided for legal dissolution of marriage.[1] So long as such a divorce has not been obtained

1. *Rajaram* v. *Deepabai*, AIR 1974 MP 52.

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by one of the two parties on presentation of a petition from a competent Court the marriage subsists and a second marriage cannot be contracted.[1] Section 29 (2) saves the right of dissolution of marriage recognised by any custom or conferred by any special enactment such as Section 5 of the Travancore Nair Act which is not repealed by Section 30 of the Hindu Marriage Act. But this does not mean that a Hindu Marriage cannot be dissolved under Section 13 of the latter Act or that the only remedy of the parties is under Section 5 of the Travancore Nair Act.[2] The grounds here mentioned cannot be added on to some notions of the interest of party or the society;[3] such as incompatability of temperament or that it would be better for all concerned.[4] Divorce, under the Act, as at present reflects in the main three categories of grounds. The first is the traditional theory of matrimonial fault (basing divorce on matrimonial offence, giving the right to the innocent party to apply for relief and vesting discretion in the Court to grant relief). The second is the theory of frustration by reason of specified circumstances. The third is the theory of consent. There is however, no theory of the break-down of the marriage except to a limited extent.[5] It was observed in *Parihar* v. *Parihar*[6] "a marriage in which the parties could no more live together deserved to be dissolved. But there is no provision in the Act, that a marriage which has broken down irretrievably should be dissolved." In England irretrivable breakdown of marriage as the sole ground for divorce was introduced by the Matrimonial Causes Act, 1973.

3. Special Marriage Act and dissolution of Hindu marriages.—Two Hindus may have married under the Special Marriage Act, or they may have married under the Hindu Marriage Act and registered the marriage under Section 15 of the Special Marriage Act, or they may have married under the Hindu Marriage Act and not registered it under the Special Marriage Act, or they may have married under the traditional sastraic law. In the first case relief of divorce will have to be sought only under the Special Marriage Act.[7]

In the second case, as a consequence of registration, the marriage will be deemed to be a marriage under the Special Marriage Act; hence relief of dissolution has to be sought only under that Act. In the last two cases, *prima facie* the matter concerns the Hindu Marriage Act or the traditional sastraic law as the case may be. An observation A. N. Modi, J., in *C. A. Neelakantan* v. *Mrs. Anne Neelakantan*,[8] would seem to suggest that even in these cases divorce could be granted under the Special Marriage Act. The case before the learned Judge was that of a man who had married a Christian woman in England seeking dissolution under Section 27 of the Special Marriage Act. In that context, referring to the Preamble to that Act which reads: "An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce." Modi, J., observed "It

1. *Ishwarsingh* v. *Hamkam Kaur*, AIR 1965 All 464 (FB).
2. AIR 1961 Ker. 311 (FB).
3. *Dwarkabai* v. *Nainal Matshews*, AIR 1953 Mad 792.
4. *Ussher* v. *Ussher*, AIR 1941 Rangoon 221.
5. See Law Commission, 71st Report, See Section 13 (1-A). Appropos the last theory.
6. AIR 1978 Raj 140 at 154; See also *Mohinder Pal* v. *Kulwant Kaur*, AIR 1976 Delhi 141.
7. See Section 29 (4), Hindu Marriage Act.
8. AIR 1959 Raj 133.

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may also be pointed out in this connection that the Preamble to the Act shows that so far as divorce is concerned, the Act is all embracing and would govern the dissolution of all marriage irrespective of the consideration whether the marriage is of the special form envisaged under the Act and whether it has been registered under the Act or not." An argument may be founded on this dictum that the parties though married under the sastraic Hindu law or after the commencement of the Hindu Marriage Act, can yet at their choice seek dissolution of their marriage under the Special Marriage Act even if the marriage had not been registered under that Act. Such an argument, however, is not acceptable. The Preamble sets out only the goals. Operative force has to come from the body of the Act and there is no section expressly or by implication conferring power to grant divorce in respect of marriages not performed under the Act except where they have been registered under the Act.

4. Voluntary sexual intercourse.—This clause lays down as a ground for divorce the respondent's voluntary sexual intercourse with another after the solemnisation of the marriage. The person with whom the sexual intercourse was had may be a virgin or a married woman or she may be a public woman or one who though married is immoral.[1] It must be noticed that what is made a ground is voluntary sexual intercourse and not being merely familiar or intimate with another even to an indecent degree which falls short of sexual intercourse. Intercourse implies the consent of both parties to the act, and the fact that the respondent was raped by another against her consent or by mistake as for instance in the dark she had intercourse with another under the impression that other was her husband, or she was made to agree to the act by her doctor under the belief that it was an operation, or when it was done under anaesthetic which made her insensible to the act, etc. In other words it must have been a willing and a knowing act consented to by the respondent in violation of the matrimonial obligation not to have sexual intercourse with any person other than the spouse. Sexual intercourse must show penetration, and mere kisses, huggings and embraces and even an attempt at sexual intercourse which did not succeed due to any of the imaginable reasons would not amount to a valid ground under this clause.

Sex loyalty to the spouse is a single loyalty and cannot admit of division or duality. Besides, adultery implies a penetrative sexual intercourse, and if there is no penetration to any degree but a mere attempt of sexual intercourse it is not sufficient to constitute adultery. No doubt, the sexual intercourse need not be complete, but penetration is necessary either to a smaller or larger degree. As was held in *Dennis* v. *Dennis*,[2] adultery cannot be proved unless there be some penetration though it is not necessary that the complete act of sexual intercourse has taken place. If there is the penetration by the man of the woman adultery may be found, but if there had been no more than an attempt at the operation a finding of adultery would not be correct. In the above case, it was further laid down that if a man and woman who were attached to each other went to the woman's bedroom and took off the greater part of their clothing and lay on the bed together, there would arise in most cases a presumption of adultery which it would be extraordinarily difficult to rebut. But this inference was capable of being rebutted if it was found that at the time at which the two were together on the bed, the man was impotent in regard to the woman and was unable to get an erection with the consequent inability to penetrate the woman to any degree, with the result that the adultery would not be held to have been proved.

1. *Olga Thelma Gomes* v. *Mark Gomes*, 61 Cal WN 395.
2. (1955) 2 All ER 51.

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Ground of relief under this clause is known as adultery in matrimonial law. The clause however does not use the term 'adultery'. Even a single act of sexual intercourse subsequent to the solemnisation of the marriage by the respondent with a person other than his or her own spouse will now be enough to sustain a case.[1] Section 125 (a) of the Criminal Procedure Code, 1973, provides that a wife's claim for maintenance under that section may be refused if at the time the claim is made she is "living in adultery".

The words 'living in adultery' mean a continuous course of adulterous life as distinguished from one or two lapses from virtue.[2]

While the finding of the respondent's wife in the company of a person other than her husband having been dragged by him into a shed by holding her hand would not amount to having sexual intercourse with any person other than her husband.[3] If an unrelated person is found alone with a young wife after midnight in her bedroom in actual physical juxtaposition, that circumstance unless explained in manner compatible with innocence would justify inference of adultery.[4]

Besides, adultery cannot be said to have taken place by reason of the sexual intercourse had by either spouse with a stranger when the intercourse had taken place either by coercion or fraud or mistake. If the respondent *bonafide* believed that the person with whom he or she had intercourse was the petitioner—such a thing is possible in cases of sexual intercourse occurring in masquerades—no adultery can be said to have been committed. Nor can sexual intercourse be held to have taken place where the spouse was forced to it in the sense of rape having been committed. Sexual intercourse, as it implies from the expression intercourse, must be bilateral and consensual. If the spouse who is charged with adultery by reason of sexual intercourse with a non-spouse had been the victim of rape in the circumstances in which he could not but submit to the intercourse by reason of the force executed by the other party to the action, there is no willing sexual intercourse which is an ingredient of adultery.[5]

The sexual intercourse had by the respondent with a stranger need not have been committed within India, and though the operation of the Act is confined to India, the fact that one of the grounds for the relief had its habitation outside India does not prevent a petition being presented in India for the necessary relief based upon that ground.[6] Adultery committed before marriage is not a ground for relief.[7]

5. Proof of sexual intercourse.—Adultery is generally proved by presumptive proof based upon (a) circumstantial evidence, (b) evidence of non-access and the birth of children, (c) contracting venereal diseases, (d) by

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1. See *Mahalingam Pillai* v. *Amsavalli*, (1956) 2 MLJ 189, for divorce under this clause or judicial separation under Section 10 (1).
2. *Valliammai Achi* v. *Singaram Chattiar*, (1966) 2 MLJ 425.
3. *Sadhu Amma* v. *Salyanarayana*, (1967) 1 An. WR 179.
4. *Subba Rama Reddiar* v. *Saraswathy*, (1966) 2 MLJ 363 : AIR 1967 Mad 85; Cf. *Chandra Mohini* v. *Avinash*, AIR 1967 SC 584 (mere fact of male relation writing improper letters to a married woman does not necessarily prove illicit intimacy between them).
5. *Mahalingam Pillai* v. *Amsavalli*, (1956) 2 MLJ 289.
6. *Gerald* v. *Esid*, 45 Cal WN 249.
7. *Coleman* v. *Coleman*, (1955) All ER 617.

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evidence of visits to houses of ill-repute, (e) decrees and admissions made in previous proceedings, and (f) confessions and admission of the parties which however are rarely acted upon in the absence of corroboration. That the respondent had sexual intercourse with another may be proved not only by direct evidence but also by such circumstantial evidence as convinces a reasonable man of its having taken place. In fact adultery is seldom susceptible of proof except by circumstances which would lead to that conclusion. The birth of a child to the wife when there was no access to her by the husband during the possible period of conception show the adultery of the wife.[1] Mere suspicion and opinion cannot take the place of proof and there must be evidence to show not only opportunity to commit the adultery, but also desire or inclination to commit it.[2] In the American Jurisprudence, Vol. 17 the following paragraphs occur which bear upon this question :

> "The intent and disposition of the parties towards each other give character to their relations and can be ascertained only from acts and declarations of the parties. It is true that the fact to be proved is the existence of a criminal disposition at the time of the act charged ; but the indications by which it is proved may, and ordinarily do, externed over a period of time both prior and subsequent to it. The rules governing human conduct and known to common observation and experience are applied in these cases as in all other investigations of fact. Thus, it is a general rule that evidence having a logical tendency to prove an adulterous disposition or infatuation between the defendant and his or her alleged paramour is admissible. This rule admits evidence of acts both prior and subsequent to the adultery charged, even including acts with the alleged paramour occurring prior to the marriage of the parties. The limitation of the rule is that the acts sought to be shown must be sufficiently significant in character and near enough in point of time to lead the guarded discretion of a reasonable and just man to a belief in the existence of this important element in the ultimate fact to be proved. An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence, at any particular point of time, from facts illustrating the preceding or subsequent relations of the parties. Evidence of the husband's commands to the wife prohibiting her association with the alleged paramour in the presence of a third person and of her clandestine violation of the command has been held admissible as tending to show her infatuation with the alleged paramour. According to the weight of authority, however, evidence of immoral or indiscreet conduct on the part of the defendant with men other than those with whom adultery is directly charged is not admissible although there is authority to the contrary.

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1. *Anthony* v. *Merly*, ILR 62 Cal 1080.
2. *Mahalingam Pillai* v. *Asmawalli*, (1956) 2 MLJ 289.

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In the absence of statutory provisions to the contrary the admissions of the defendant would be competent to prove adultery on his or her part, although such proof alone without corroboration may not be sufficient. In some instances, the statutes have provided expressly or in effect that the declarations or confessions of neither party shall be received in evidence to prove the adultery. Such construction has been given to a statute prohibiting the entry of decrees of divorce *pro confesso* or by default. On the other hand, the object of statutory restrictions on the admissibility of such declarations and confessions has been said to be the exclusion of confidential communications between husband and wife and of declarations by either that may have originated in a conspiracy between them to manufacture or furnish evidence sufficient to warrant a decree of divorce. It would seem that when there is no danger of opening the door for collusive testimony, admissions by either the husband or the wife to or in the presence of third parties are admissible, especially when connected with other evidence of improper relations. Thus, it has been held that the testimony of a third party as other request of the wife to be allowed to pay the costs of a prosecution against her alleged paramour is admissible, not as a confession of her guilt, but as a circumstance tending to show her interest in, and association with him, and to corroborate other testimony as to adulterous intercourse with him.

The admissions and confessions of the paramour not made in the presence of, or communicated to, the defending spouse, are not admissible to prove his or her adultery, although they have been held competent where the foundation indicated was laid."

The onus of proof is on the person alleging adultery.[1] The early view was (but not now) that proof should be proof beyond reasonable doubt.[2] Proof

1. See *Chander Prakash* v. *Sudesh Kumari*, AIR 1971 Delhi 208; *Champa Gouri* v. *Jamnadas Amirchand*, (1971) 1 APLJ 230.

2. See *Bipin Chandra* v. *Prabhawati*, AIR 1957 SC 176; *Varadarajulu* v. *Baby Ammal*, AIR 1965 Mad 29; *Bhagwanti* v. *Sadhu Ram*, AIR 1961 Punj 181; *Harish Chandra* v. *Rama Gouri*, 1969 BLJR 999; *Narayanan* v. *Parukutty*, 1973 Ker LT 80 : 1973 Ker LJ 120; *Kunhikannan* v. *Malu*, 1973 Ker LT 431; *Chhaganlal* v. *Sakkha Devi*, AIR 1975 Raj 8; *Cf.*, *White* v. *White*, AIR 1958 SC 411 (case under the Divorce Act). *Cf.*, however *Prem Masth* v. *Kumudani Bai*, AIR 1974 MP 89 (case under the Divorce Act), holding that the view that the standard of proof required in order to be satisfied is proof beyond reasonable doubt does not now hold the field and the civil standard of proof alone will have to applied now, in view of the changed interpretation of the law in England in *Blyth* v. *Blyth*, AIR 1966 All ER 524; *Cf.*, also *Champa Gouri* v. *Jamnadas Amirchand*, (supra) holding that adultery must be proved by a preponderance of probability and *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534; *Shyam Narain* v. *Shoil*, (1978) 4 ALR 882 probability and *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534; *Shyam Narain* v. *Shoil*, (1978) 4 ALR 882.

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beyond reasonable doubt is a requirement of criminal law, and even there it is only a guideline and not a festish.[1] Direct proof however is not an imperative.[2] It is highly improbable that any person could be witness to such act; hence direct proof will be very rare and even if forthcoming the Court would regard it with disfavour.[3] Normally adultery is expected to be established by circumstantial evidence. It is not possible to lay down a rule of thumb as to what circumstances would be sufficient to establish adultery. The only general rule is that the circumstances must be such as would lead to a guarded judgment of a reasonable and just man to that conclusion. The Court would not as a general rule infer adultery from evidence of opportunity alone but would require some more satisfactory proof.[4] Evidence of a guilty inclination or passion is needed in addition.[5] To establish adultery it is not necessary to prove the direct fact or even an act of adultery in time and place, or even necessarily the name of the person with whom the respondent is alleged to have committed adultery.[6] The birth of a child 11 months and 20 days after final parting company with husband would go a long way to establish adultery on the wife's part.[7] Likewise the birth of a child 402 days after final severance of ties was proof that the child was born only as a result of the wife's sexual intercourse with someone other than the husband and no other evidence is needed to prove this.[8] The conduct of the wife though would fan fire of suspicion, on facts still adultery is not proved and there is no danger to the health of the appellant husband. Held that, the appeal is dismissed.[9]

In *Tribhut Singh* v *Vimla Devi*,[10] the facts found were that the wife had been frequently absenting herself from her house for days at a stretch and during such periods of her absence was found in company with a total stranger and no explanation had been forthcoming for the woman being found in the stranger's company at several places, and it was held that these facts would be consistent with a finding that she had been living in adultery with that man. The degree of proof need not reach certainty but must carry a high degree of probability.[11]

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1. *Inder Singh* v. *The State*, AIR 1979 SC 10, 11.
2. *Chandra Mohini* v. *Avinash*, AIR 1967 SC 384; *Vedavathi* v. *Ramaswamy*, AIR 1964 Mys 280; *Devyani* v. *Kauntilal*, AIR 1963 Bom 98.
3. *Simon Lakra* v. *Bakla*, ILR 11 Pat 627; *Phillips* v. *Emperor*, AIR 1925 Oudh 508.
4. *Pushpa Devi* v. *Radheyshyam*, AIR 1972 Raj 260; *Chhaganlal* v. *Sakha Devi*, AIR 1975 Raj 8. See further *Subbarama Reddiar* v. *Saraswathi*, AIR 1967 Mad 85; *Puttayee* v. *Manickam*, AIR 1967 Mad 254; *Barker* v. *Barker*, AIR 1955 MB 103; *Hearsey* v. *Hearsey*, AIR 1931 Oudh 259.
5. *Champa Gouri* v. *Jamnadas Amirchand*, (1971) 1 APLJ 230.
6. *Champa Gouri* v. *Jamnadas Amirchand*, supra; *Barker* v. *Barker*, supra; *Hearsay* v. *Hearsay*, supra.
7. *Kamlesh Kumari* v. *Balbir Singh Bedi*, AIR 1973 P & H 152.
8. *Vira Reddi* v. *Kistamma*, 81 LW 490 : AIR 1969 Mad 235 : (1969) 1 MLJ 366.
9. *P. Appellant* v. *P. Respondent*, AIR 1983 Bom 8.
10. AIR 1959 J & K 72.
11. *Baby Ammal* v. *Varadarajulu*, 82 LW 18; *Vira Reddi* v. *Kistamma*, 81 LW 490 : AIR 1969 Mad 235 : (1969) 1 MLJ 366 (proof beyond reasonable doubt does not mean proof beyond a shadow of doubt or that it should reach certainty reversed by Supreme Court on another point.

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Plea of non-access should be specifically taken in pleadings; admissions or statements by the wife made in an unguarded moment cannot be flung at her at the time of argument.[1] Evidence on the point by the spouses is admissible,[2] but should be considered with caution, with a lions-eye.[3]

An application for dissolution of marriage is straightaway maintainable on the ground of adultery without need for a prior decree for judicial separation.[4]

Cohabitation with the respondent at different places subsequent to knowledge by the petitioner of the alleged adultery would, in the absence of proper explanation of the petitioner's conduct amount to condonation disqualifying the petitioner to relief.[5]

Where a husband against whom a decree for judicial separation has been passed at the instance of the wife, commits adultery, subsequently, the wife is entitled to a decree of divorce on the ground that the husband has been living in adultery.[6] The judicial separation does not amount to an immunity for matrimonial offence and it is no argument for the respondent to urge that he or she being separated under an order of judicial separation, the petitioner ought not to bother as to how the respondent conducts himself or herself.

The petitioner for a decree of divorce is expected to come with clean hands, and the question may therefore arise if he or she has been guilty of adultery, whether a petition on the ground of respondent's adultery should be viewed with favour. The answer is provided by Section 23 (1) (a) which vests a discretion in the Court to consider all the circumstances of such a case and see if the petitioner should be given the relief. No doubt, there in no express provision in the Act and certainly not in this particular section to the effect that the petitioner who is guilty of adultery cannot submit a petition for divorce against the respondent. But the wide and comprehensive qualification embodied in Section 23 (1) (a) will meet the justice of any particular case.

6. Scope and object.—Mere severance of all connections with the wife by the husband because of his ill-health and allowing her to re-marry any person she likes cannot amount to a divorce within the meaning of Section 13 of the Act, because a divorce which could result in the dissolution of a solemnized marriage has to be obtained by one of the two parties on presentation of a petition, from a competent Court. So long as such a divorce has not been obtained, the marriage subsists and, therefore, second marriage cannot be contracted by a Hindu so long as the other spouse is living.[7] Sections 5, 9, 10 and 13 and other provisions of Hindu Marriage Act are protected under Article 25 (2) (b) of Constitution of India.[8] It is only in a case where

1. *Anandi Devi* v. *Rajaram*, AIR 1973 Raj 74.
2. *Vira Reddi* v. *Kistamma*, 81 LW 490.
3. *Dwarka Bai* v. *Nainan*, AIR 1953 Mad 792.
4. *Anupama* v. *Bhagaban*, ILR (1971) Cut 1447 : AIR 1972 Orissa 168; *Suseela* v. *Gopalakrishna Prabhu*, AIR 1975 Ker LT 72.
5. *Jagan Mohan Rao* v. *Swarup*, (1972) 2 MLJ 77 ; 85 LW 484.
6. *Green* v. *Green*, LR 3 Prob 121.
7. 1964 All WR (HC) 659 : (1965) 2 Cr LJ 449 (1).
8. AIR 1957 All 411.

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one of the spouses has a virulent and incurable type of leprosy that resort could be had to Section 13 (1) (iv) of Hindu Marriage Act. The legislature has advisedly used both expressions 'virulent' and 'incurable' in Section 13 (1) (iv). Every form of leprosy cannot be considered to be virulent but only that which is malignant or venomous. If the husband is suffering from mild form of laprosy the wife cannot claim divorce.[1] A petition for dissolution of marriage under Section 5 (1) (b) of Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 by the wife was filed wherein concubinage is not proved and in appeal plea for dissolution of marriage under Act 25 of 1955 on ground of adultery is not available.[2] Application for judicial separation on completion of four years desertion from 22-12-1950 and subsequent amendment converting it into suit for divorce on same ground under Section 3 (1) (d), 4 of Bombay Hindu Divorce Act, 1947 is not tenable by repeal of Bombay Act 25 of 1955 and no saving under Section 6 of General Clauses Act, 1897 could be availed of.[3] English decisions on the point of medical examination of the other party can have no application in this country to a case arising under Hindu Marriage Act.[4] There is no provision in Hindu Marriage Act whereby in a petition for divorce against the wife on the ground of adultery, the husband can claim damages against the alleged adulterer.[5] When a Court grants a decree for divorce on the basis of the statement made by the husband, without giving judicial findings on the plea of adultery, the Court exercises a jurisdiction not vested in it by law and it is thus a case where the High Court must in the exercise of its powers of superintendence interfere in order to keep the Court below within four corners of its legitimate authority.[6] It is not the function of a Court, constituted under the Hindu Marriage Act, to grant a decree of divorce, or a declaration of divorce, on the basis of custom.[7] The saving of right of dissolution of custom or special enactment such as Section 5, Travancore Nair Act is effective still parties can invoke Section 13 for dissolution of Hindu Marriage.[8] Among Thillyas hailing from Ernad Taluk in Malabar a customary form of divorce does exist in the form needed in this case. There is no authority which has gone to be extend of holding that a custom as to divorce in which the wife's consent has no place is on this sole account rendered 'Barbarous or Repugnant to equity' so as to make it unreasonable.[9] A petition under Section 13 (2) by wife on ground of second marriage by husband and second marriage solemnized after commencement of Act. The second marriage and the fact of living with second wife was admitted by husband and connivance or condonation by petitioner was not proved. It was held that second marriage of the husband was null and void *ab initio* under Section 11 read with Section 5 (i) living with second wife amounted to 'adultery'. The petitioner though not entitled to a decree of divorce under Section 13 (2), was entitled to the same under Section 13 (1) (i).[10] When the

1. AIR 1963 AP 312 (DB) : ILR 1964 AP 1368.
2. AIR 1957 AP 914 (DB).
3. AIR 1958 Bom 116 (FB) : AIR 1958 Bom 26, overruled.
4. AIR 1963 Guj 250.
5. AIR 1963 Guj 152.
6. AIR 1958 HP 15.
7. *Ibid.*
8. AIR 1961 Ker 311 (FB).
9. 1958 Ker LT 916.
10. *Gitabai* v. *Fattoo*, AIR 1966 MP 130 (DB) : 1965 MPLJ 559 : 1965 Jab 663.

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husband was living continuously with another woman whom he calls his wife and going through ceremony of marriage after commencement of Act. Divorce was claimed by first wife wherein Section 13 (1) (i) not Section 13 (2) (i) will apply.[1] A pre-marriage conduct of a spouse cannot establish adulterous conduct after marriage.[2] A petition for divorce by wife on the ground that other wife married by husband before commencement of Act was living in marital relationship with him. The plea of husband that wife was living adulterous life and was taking advantage of her own wrong. It was held that wife's adulterous conduct, even if assumed, could not be said responsible for husband's wrong and that her conduct could not be termed wrong for purpose of relief claimed.[3] Section 29 (2) of the Act states that nothing contained in the Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of marriage whether solemnized before or after the Act. Thus the Act does not disturb the position which a customary divorce occupied before the enactment of the Act. What has to be found as a fact for this exception to operate is, whether there had been as a fact such a customary divorce or dissolution of a Hindu Marriage. In the matter of divorce according to custom it is not necessary for the parties to have again to go before the Court under Section 10 or 13 of the Act and obtained the sanction of the Court in order that the divorce or dissolution may be rendered valid.[4] A suit for divorce was pending under Madras Act during which Central Act came into force at the time of appeal, wherein aid of Central Act may be invoked.[5] The provisions of Section 28 clearly indicate that there is a deliberate purpose underlying the different nomenclatures used to describe differently the decisions under the different sections. Consequently, such of the decisions under the Act as are described as decrees by the Act itself shall be appealable in like manner as the decrees of the Court in civil suits and such of the decisions under the Act as are referred to as orders in the Act shall be appealable in like manner as orders in suits or other original proceedings. A decision in the original proceedings under Section 13 of the Act having been described as a decree the parties are entitled not only to present an appeal under Section 28 of the Act read with Section 36 of the Civil Procedure Code but also have the right of presenting a further appeal against the decree passed on appeal under Section 28 of the Act read with Section 100 of the Civil Procedure Code on any of the grounds mentioned in the latter.[6] A wife filed a petition for divorce on the ground that the respondent was a drunkard, a vagabond and that he was in the habit of beating her mercilessly for little or no reason. The petition was filed before completion of three years from the marriage of the parties. The petition was dismissed on the ground that there was no case of exceptional hardship. It was held that the circumstance that the petitioner was being mercilessly beaten for little or no reason was a circumstance which would bring the proviso to Section 14 (1) Hindu Marriage Act, into operation and justify grant of permission, even though three years had not elapsed when the petition was made.[7]

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1. *Chanda Ghhitar Lodha* v. *Mst. Nandu*, AIR 1965 MP 268 (DB).
2. 1964 MPLJ (Notes) 3.
3. (1965) 78 Mad LW 698.
4. 1963 Mad LJ (Cr) 212.
5. (1956) 2 Mad LJ 289.
6. 40 Mys LJ 62 ; ILR 1961 Mys 981 ; AIR 1962 Mys 172 (DB).
7. 1959 Nag LJ (Notes) 78.

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To the case of a petition for divorce filed by the wife against her husband joining a female as co-respondent, Rules 11 and 12 (a) apply directly. The female co-respondent adulteress is neither a necessary nor a proper party to such a divorce petition in view of Rules 10, 11 and 12 (a) claimed by the High Court, and the only manner in which she can intervene in such a petition is in accordance with the provisions of Rules 11 and 12 (a) and that too with the leave granted in that behalf to intervene by an order of the Court. The consequence then is that the application of such a female under Order 1, Rule 10 of the Code of Civil Procedure to remove her name from the array of respondents in the divorce petition must succeed.[1] The effect of permission to withdraw the petition when petition under Section 12 subsisting. Application under Section 24 filed by respondent's wife for interim maintenance was allowed but the amount of maintenance was not paid and the petitioner husband seeking withdrawal of petition on the ground of filing fresh petition under Section 13 and the petition can be dismissed as withdrawn but dismissal cannot *ipso facto* wipe out order of maintenance from very start. It is interim order and will operate till termination of proceedings under Section 12 and compliance of order under Section 24 cannot be made condition precedent for petition under Section 13 of the Act.[2] Even isolated acts of violence to the wife cannot be treated lightly as new rules of social behaviour are to be observed.[3] The sub-clause (b) of Section 13 (1) (iii) is not independent but can only apply after a decree for judicial separation has been passed and hence it is not open to Court to apply that clause and give a divorce forthwith.[4] The right of divorce given to the first wife by Section 13 (2) (i) does not depend on her conduct prior to the commencement of the Act.[5] When dealing with the question of delay, one should not be oblivious of the background and tradition of Hindu Society and instinctive reluctance amongst the women to come to the Court and seek the redress of their grievance against the husband. It has to be decided in the facts of each case.[6] A Hindu marriage can be annulled by a decree of divorce of Foreign Court.[7] A consent decree for restitution of conjugal rights can form basis of divorce proceedings.[8] The remedies by way of divorce, viz. dissolution of marriage, judicial separation and restitution of conjugal rights are distinctive in character, and have been devised with a set purpose. The significant feature of petition for restitution of conjugal rights is, that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce, or judicial separation. The court cannot enforce sexual intercourse but only cohabitation. That being the purpose of the petition for restitution of conjugal rights ; the petitioner must show that he is sincere in the sense, that he has a *bona fide* desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The petitioner who is sincere in that sense is entitled to a decree even though the

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1. *Smt. Sarla Sharma* v. *Smt. Shakuntala*, AIR 1966 Punj 337.
2. 1965 Cur LJ 40 ; 67 Punj LR 485.
3. AIR 1960 Punj 422.
4. *Chandramohini* v. *Avinash Prasad*, AIR 1967 SC 581 : 1967 All LJ 167 ; AIR 1964 All 486 reversed.
5. *Smt. Nirmoo* v. *Nikka Ram*, AIR 1968 Delhi 260.
6. *Ibid.*
7. AIR 1971 Punj 80.
8. *Joginder Singh* v. *Smt. Pushpa*, AIR 1969 Punj 397 (FB) ; ILR 1968 2 Punj 714.

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parties may not evince any affection for each other. A petitioner has, therefore, to satisfy the Court of his sincerity in wanting to resume cohabitation with the respondent ; if the decree is obeyed, then the petitioner may move the Court for obtaining a decree for dissolution of marriage in accordance with law and procedure.[1] The mere existence of circumstances entitling relief does not automatically result in dissolution of the marriage and a decree on a petition filed for the purpose is necessary. In the absence of such a decree marital relationship continues, and wife is entitled to claim partition as heir of her husband since dead.[2]

Where trial Court grants judicial separation and appellate Court simply affirms it, the time under Section 13 (1) must be reckoned from the trial Court decree.[3] Section 13 (1-A) being substantive provision is prospective and not being made retrospective expressly or impliedly does not vest the spouse against whom decree had been passed prior to its enforcement, with the right of filing a petition, of which he stood divested prior to its enforcement.[4] A Hindu Marriage can be annulled by decree of divorce of Foreign Court.[5] The divorce by mutual consent requires the Court to be satisfied that a marriage has been solemnized and the averments in the petition are true, then decree for divorce must follow.[6] Unlike Section 13 (1) (viii) of the Hindu Marriage Act, the Divorce Act makes no provision for a decree for dissolution on the ground that the parties to a decree for a judicial separation have not a resumed cohabitation for a prescribed period of time since after passing of such a decree. The decree for judicial separation is effective by itself.[7] The allegations in written statement by wife that her husband was having adulterous relations with his sister-in-law cannot constitute an act of cruelty to warrant a decree for dissolution of marriage against her, if the husband has made accusation of unchastity against her.[8] During the pendency of appeal if both parties submit compromise application agreeing to dissolution of marriage, compromise is neither unlawful nor the result of collusion between the parties. The Court can dissolve by agreement of the parties, even if none of the grounds on which Court can dissolve marriage exists.[9] The petition for divorce on the allegation of desertion by wife in consequence of her suffering from deformity called 'infuntile uterus' the application by husband to direct his wife to be medically

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1. *Captain B. R. Syal* v. *Smt. Ram Syal*, AIR 1968 Punj 489 : 70 Punj LR 481 : ILR (1968) 2 Punj 388.
2. *M. Narasimhareddy* v. *M. Boosamma*, AIR 1976 AP 77 : 1975 Andh LT 218
3. 1973 J & K LR 200 (DB).
4. *Shri Raghbir Singh* v. *Smt. Satpal Kaur*, AIR 1973 Punj 117 : 75 Punj LR 70.
5. AIR 1971 Punj 80 (Reversed in *Smt. Satya* v. *Teja Singh*, AIR 1975 SC 105.
6. *Ravishankar Nihansingh* v. *Sharda*, 1977 MPLJ 784 (DB).
7. *Arunkumar Sinha* v. *Smt. Manjula Sinha*, AIR 1981 Cal 252 (FB).
8. *Smt. Sulochana* v. *Ramkumar*, AIR 1981 All 78.
9. *Indrawal* v. *Radhey Raman*, AIR 1981 All 151.

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examined and the wife resisting application by denying the defect. Application could not be granted by resorting to Section 151 of C. P. C. or any other provision.[1] A single act of misconduct of either spouse is forgived and restored to original position it would amount to condonation of the Act, disentitling the aggrieved spouse to get any relief from the matrimonial Court. But a continuing course of conduct on the part of the spouse tantamounts to causing mental cruelty and made the basis of relief, then no condonation can be pleaded. False imputation of adulterous conduct on the part of husband amounts to cruelty and right of divorce is maintainable. Overall effect of behaviour should be considered.[2]

Where the husband use to beat wife and did not even permit her to talk to any neighbour, male or female and threatened that she would be put to death in case she talks to anybody, the cruelty was held to be established and delay in itself is not fatal to filing of petitions under the Act if reasonal explanation is given.[3] The allegations in written statement by wife in the divorce petition the husband could not afford any cause of action for any relief on the husband's petition for divorce.[4] The allegation of adultery made against a spouse in a written statement does not by itself amount to cruelty. The petitioner must establish falsity of such allegation in order that it may constitute cruelty.[5] The wife became pregnant after the husband had undergone vasectomy operation. It was claimed by husband in divorce petition that the wife became pregnant by illicit intercourse. It was held that the decree for divorce cannot be sustained as success of vasectomy operation was not proved and no case was made out by the husband that he had no sexual intercourse with the wife during the period she could have conceived. Also allegation of illicit relations not repeated on oath in witness box. The presumption is that the husband was the father of the child.[6] When the wife was pregnant and left for father's house it did not constitute desertion even though she left without husband's consent. The Court must look for the existence of two elements for to find the desertion ; first the factum of physical separation and ; second the *animus deserendi*, i.e. the intention to bring cohabitation permanently to an end.[7] The false charge of adultery made by wife and husband not stating that it caused him mental anguish and false charge made in retaliation to false charge of incest against wife. It was held that false charge against husband did not constitute cruelty so as to entitle the husband for decree of divorce.[8]

7. **Cruelty—General.**—Cruelty simpliciter is now a ground for divorce as well as judicial separation. Prior to the Marriage Laws (Amendment) Act (LXVIII of 1976) cruelty was not a ground for divorce but under Section 10 (1)(b) of the 1955 Act prior to the Amending Act of 1976 it was a ground for judicial separation provided it was such as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious

1. *N. Venkatachulapathy* v. *Saroja*, AIR 1981 Mad 349.
2. *Smt. Krishnarani* v. *Chunilal Gulati*, AIR 1981 P & H 119.
3. *Smt. Kaushalya Devi* v. *Masatram*, AIR 1981 H & P 63.
4. *Sadansingh* v. *Smt. Resham*, AIR 1982 All 52.
5. *Parsram* v. *Kamlesh*, AIR 1982 P and H 60 (DB).
6. *Chandramati* v. *Pashettibalan*, AIR 1982 Ker 68 (DB).
7. *P. Indiradevi* v. *Kumaran*, AIR 1982 Ker 78 ; (1982) 1 Civi LJ 199 (Ker).
8. *Smt. Pushparani* v. *Krishanlal*, AIR 1982 Delhi 107.

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for the petitioner to live with the other party. Under the Act it is not further necessary to show that such injury should be to the health, life or limb, bodily injury or harm. It may include cases other than that of injury and harm to one's body, limb or health. It may be harm to reputation or social position.[1] The conduct complained of must be much higher than the ordinary wear and tear of married life.[2] Now both as a ground for divorce as well as judicial separation, cruelty in its universality has been brought in. It is difficult to define what constitutes cruelty in all cases, and each case has to be judged on its own facts and circumstances, having regard to the conduct of the parties, their previous relations to each other, their status in life, the particular acts of cruelty alleged and the causes that precipitated it, the state of health of the parties and numerous features which cannot be brought in and confined to an exclusive and inclusive difinition. In view of this difficulty of defining cruelty, the Courts have generally confined themselves to the task of determining whether the facts in the particular case in question constitute cruelty. This, however, does not mean that one cannot broadly indicate what may or may not amount to cruelty, all the while remembering that the same set of facts may amount to cruelty in the background of the relations between the parties in a particular case while in another set of circumstances those facts may fall below the requisites warranting the conclusion of cruelty. Generally there must be an intention to cause suffering to the other spouse. The concept of cruelty has varied from time to time, place to place, individual to individual in its application according to the social status of the parties and their economic conditions etc. culture, temperament, status in life are factors to be considered.[3]

Cruelty in matrimonial law may be of infinite variety. It can be subtle or brutal. It may be physical or mental. It may be by words, gestures or by mere silence, violence or non-violence.[4] The question of cruelty must be determined from the whole facts and the matrimonial relations between the spouses. It must be determined as a cumulative effect of all the circumstances.[5] The question of cruelty is to be judged on the basis of the evidence on record and the totality of the circumstances of the case.[6]

In cases of cruelty corroboration is generally expected.[7] This is afforded by evidence of relations, friends, doctors and neighbours who have seen the external manifestations.[8]

Where the wife was held to be guilty of cruelty but inspite of that there was no evidence at all, not a single word in the evidence that the conduct of the wife has caused any danger to the health of the husband or has given rise to any apprehnsion of such danger. Such an allegation was made in the petition but there was no evidence to the effect given in examination-in-chief.

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1. *Suseela* v. *Gopalakrishna Prabhu*, 1975 Ker LT 72.
2. *Parihar* v. *Parihar*, AIR 1978 Raj 140.
3. *Sreepadachar* v. *Vasantha Bai*, AIR 1970 Mys 232.
4. *Dr. Narayan Ganesh* v. *Mrs. Sucheta*, ILR (1969) Bom 1024 : 71 Bom LR 569 : AIR 1970 Bom 312.
5. *Sreepadachar* v. *Vasantha Bai*, AIR 1970 Mys 232.
6. *Neera* v. *Kishan Swarup*, AIR 1975 All 337.
7. *Yadurai* v. *Sunderbai*, AIR 1969 Guj 21.
8. *Frowhold* v. *Frowhold*, (1952) 1 TLR 1522, 51 27.

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In any view, looking to the circumstances of the case though it was unjust to compel the petitioner-husband to continue his marriage with the respondent-wife, it was unfortunate that, the law being what it is, there was no alternative but to dismiss the appeal.[1]

To prove cruelty there should be a reasonable apprehension that it will be harmful to live with the other spouse.[2] Proof of motive or intention to be cruel is not necessary.[3] An unfounded or imaginary apprehension will not do. It must be reasonable in the sense that the spouse, circumstanced as he or she will as a reasonable person entertain the fear of such injury or harm. In *Russell* v. *Russell*,[4] the majority of the Law Lords define legal cruelty as conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger. The English definition of 'cruelty' was held to be inapt in a case under Section 10 (1) (b) of the Hindu Marriage Act, 1955 because of the departure from the language of the definition in English decisions as to what amounts to cruelty.[5] What the Courts must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law but whether the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in that person's mind that it will be harmful or injurious for the person to live with the respondent.[6]

Acts of cruelty must be specifically pleaded. Allegations generally of nagging, neglect and assault will not be enough. Specific instances of the conduct should be described in the particulars.[7]

Cruelty in order to be a ground for divorce must be some such conduct of the respondent as gives the petitioner a reasonable cause of apprehension of injury to body, mind or health in the future. Past conduct was undoubtedly relevant as it forms the very basis of the reason for the apprehension of the injury or harm in the future.

Cruelty can be mental ; but when one speaks of mental cruelty as distinct from physical cruelty, the idea is to show that while in the case of physical cruelty, harm or injury inflicted is to the body directly in the case of mental cruely, the harm or injury caused is through the mind, but nevertheless it is a harm or injury caused to the human body. The injury when caused to the physical body is something which could be perceived by the senses but when it is caused mentally, the result of it may appear later on by affecting the health of the person to whom it is caused. Every mental tension cannot amount to infliction of mental cruelty. It must be shown that the injury inflicted through

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1. *P* v. *P and others*, AIR 1983 Bom 8 at p. 12 : 1982 (1) Bom CR 236.
2. *Stuart* v. *Stuart*, AIR 1926 Cal 864.
3. *Trimbak* v. *Kumudini*, AIR 1967 Bom 80.
4. 1897 AC 395 ; See also *Ramesh Chandra* v. *Nandita*, 1974 (1) CWR 593.
5. *Suseela* v. *Gopalakrishna Prabhu*, 1975 Ker LT 72 ; *Dr. N. G. Dastane* v. *Mrs. Dastane*, AIR 1975 SC 1534.
6. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, supra.
7. *Garoen* v. *Garoen*, (1962) 3 All ER 241 ; *Porr* v. *Porr*, (1968) 1 WLR 98.

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the mind of the petitioner has affected his health, or that the future repetition of that injury is most likely to affect his health.[1]

The question of legal cruelty can be considered under the following headings ;

(*a*) *Actual or threatened physical violence.*—Actual violence or threat of such violence or threat of such violence of such a character as to give rise to an apprehension of danger to life, limb or health will undoubtedly constitute cruelty. Mere slight acts of violence which any spouse may commit in anger or worry cannot be a ground for holding that legal cruelty exists. Though ordinarily a single act of violence ought not to justify a charge of cruelty,[2] it is not an invariable rule as it is possible in particular circumstances even for a single act of a grossly violent character being held to constitute legal cruelty. Cruelty, by physical violence can be committed both by the husband and wife, though cases of cruelty by the wife must in the nature of things, be rare. Cruelty does not lie in merely beating the spouse.[3]

(*b*) *Verbal abuse and insults.*—The continual use of abusive and insulting words spitefully indulged into bring shame and mental agony to the other spouse which will tend to undermine the health of that spouse may in the circumstances of any particular case amount to legal cruelty. Mere trivial incidents which are merely the wear and tear of married life do not constitute cruelty.[4] Using foul and abusive language to the husband and his parents and picking up quarrels tending to disturb husband's mental peace amounts to cruelty.[5]

(*c*) *Excessive sexual intercourse.*—Demand by the husband of exessive sexual intercourse and compelling the wife to submit to it against her wish and despite her remonstrance resulting in the impairment of her health will amount to cruelty.[6]

(*d*) *Refusal of intercourse.*—The question whether refusal of reasonable intercourse will amount to legal cruelty depends upon the facts of each case. Sexual intercourse is one of the objects of marriage and if that is unreasonably refused and the refusal is persisted in

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1. *Suresh Kumar Gulati* v. *Smt. Suman Gulati*, AIR 1983 All 225 at p. 233 : (1982) 1 DMC 398.
2. *Pranab Biswas* v. *Mrinmayee Dassi*, AIR 1976 Cal 156 (single act followed by remorse insufficient).
3. *Jagannathan* v. *Savithramma*, (1972) 2 An WR 200 ; AIR 1972 AP 377.
4. *Thompson* v. *Thompson*, (1957) 1 All ER 161.
5. *Kamla Devi* v. *Balbir Singh*, AIR 1979 J & K 4 ; *Cf.*, *Manjulabai* v. *Ramachandra*, 1975 MPLJ 692 ; *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534 ; *Sreepadachar* v. *Vasanthabai*, AIR 1970 Mys 232.
6. *Kusum Lata* v. *Kamta Prasad*, AIR 1965 All 280 ; *Holborn* v. *Holborn*, (1974) 1 All ER 32.

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for a long time, it will be ground for holding that there is legal cruelty. Mere refusal of sexual intercourse is not *per se* cruelty.[1] But persistent refusal would amount to cruelty.[2] What has to be found in each case is whether the act is such which the complaining partner should not be asked to endure.[3]

(*e*) *Neglect.*—Neglect by the spouse in the discharge of his or her duties of attention and company to the other and forcing the latter to leave the home on account of such neglect would in the circumstances of any particular case constitute neglect amounting to cruelty. Incompatibility of temperament, neglect etc., will not amount to cruelty.[4] But neglect and coldness which affected the health of the wife, and which, if continued would have produced melancholia will amount to cruelty.[5] Desertion for a period of less than two years immediately before the presentation of the petition by itself will not constitute cruelty.[6]

(*f*) *Communication of venereal disease.*—It is well-settled that a spouse who knowledging that she or he is afflicted with venereal disease has sexual intercourse with the other is guilty of cruelty.

(*g*) *Drunkenness and use of drugs.*—Drunkenness and intemperance and violent behaviour due to use of drugs may not in themselves constitute cruelty, but if they result in violent acts injurious to the health, whether mental or physical, of the other spouse, then the protection of the Court is to be rendered by judicial separation.[7] In all these cases the Court should not jump to the conclusion that mere addiction to the vice of drinker drug must necessarily result in the cruelty to the other spouse as cases are not infrequent of such addicts getting on very well with their spouses despite such addiction.

(*h*) *Refusal to speak.*—Where one of the spouses through living under the same roof refuses to speak to the other for a considerably long time and on that ground the other spouse becomes wretched and worried, such conduct may be a ground for holding that there has been cruelty on the part of the spouse who refuses to speak. This conduct must no doubt be taken along with other circumstances of the case to come to the conclusion that cruelty has been established.

(*i*) *Forcing association with improper persons.*—Each spouse is entitled to have the sanctity of marital bed preserved unstillied by intrusion

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1. *Weatherley* v. *Weatherley*, (1947) 1 All ER 563.
2. *Nighawan* v. *Nighawan*, AIR 1973 Delhi 200.
3. *Ibid.*
4. *Buchler* v. *Buchler*, (1947) 1 All ER 319; *Dr. N. G. Dastane* v. *Mrs. Dastane*, AIR 1975 SC 1534.
5. *Kamlabai* v. *Ratnavelu*, AIR 1965 Mad 88; *Weatherley* v. *Weatherley*, supra.
6. *Kaushalyarani* v. *Vijai Singh*, AIR 1973 Raj 269.
7. *Baker* v. *Baker*, (1955) 3 All ER 193.

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of strangers, and if either introduces such strangers to share the life of the home and the conjugal society of the other as, for instance, by the husband inducing his wife to have intercourse with a stranger or inducing her to put up with a lewd woman whom he has brought into her room for his carnal satisfaction, the wife is entitled to resist all such immoral attempts by filing a petition for judicial separation on the ground of cruelty.[1]

(*j*) *False charge of immorality against the wife.*—Where a husband falsely charges his wife with immorality and adultery and persists in such charge, there can be no doubt that the wife must necessarily take it to her heart unless she is too thick skinned to mind it. Normally such charges if persisted in would undermine the health of any decent woman and would support her claim for relief.[2]

(*k*) *Ill-treatment of children.*—Deliberate and designed ill-treatment of the children in the presence of the mother with a view to give her pain carried to such an extent that it has affected her health and anguished her mind will amount to legal cruelty. This kind of indirect cruelty is termed constructive cruelty in *Crawford* v. *Crawford*.[3] It is held that in the case of an alleged cruelty which is not physical violence it is impossible to say whether any class of conduct is cruelty or cannot be cruelty. Cruelty may be inferred from the whole facts and atmosphere disclosed in the proof, and it is a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that they by themselves cannot pass the test of cruelty and therefore that totality cannot pass that test. Though actual intention to injure the wife in a case of mental cruelty must be important, and may be decisive in the particular case, it is not an essential factor.

(*l*) *Wife's association—Suspicion.*—Wife's association persisted in with another woman, raising suspicion of her practising lesbianism.[4]

Unhappiness in a marriage *per se* does not amount to cruelty.[5] Unruly temper of a spouse or matrimonial wranglings cannot amount to cruelty nor would it be sufficient to show that the other spouse is whimsical, exacting, inconsiderate and irascible. Incompatibility of temperament, negligence or want of affection wounding the feelings of the other or expressions of hatred or the like would not, by themselves be cogent grounds for relief. Manness, stinginess, shiftlessness, selfishness or defects of temperament cannot by themselves amount to cruelty. These must ordinarily be accepted for better or for

1. *Lalita Devi* v. *Radha Mohan*, AIR 1976 Raj 1.
2. *Iqbal Kaur* v. *Pritam Singh*, AIR 1963 Punj 242; *Kuppuswamy Goundan* v. *Alagammal*, AIR 1966 Mad 391; *Umribai* v. *Chittar*, AIR 1966 MP 205; See also *Smt. Bhaga* v. *Bant Singh*, (1972) 74 Punj LR 71; *Neera* v. *Kishan Swarup*, AIR 1975 All 337; *Shyam Narayan* v. *Shaila*, (1978) 4 ALR 882 (falsely alleging that wife had married again and was living in adultery).
3. (1955) 3 All ER 592.
4. *Spicer* v. *Spicer*, (1954) 3 All ER 208.
5. *Ramesh Chandra* v. *Nandita*, (1979) 47 Cut LT 135 : 1979 (1) CWR 17.

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worse.[1] Habitual nagging by the mother-in-law too frequent to be tolerated leading to constant dissatisfaction and mental torture would amount to cruelty.[2]

In an application for restitution of conjugal rights by the husband, the wife may plead legal cruelty in defence by expressing a fear that if she returns to her husband there would be the exercise of tyranny by him subjecting her to constant insults and abuses and accusation of adulterous conduct which would make the state of married life impossible to be endured causing a very unhappy and miserable state of existence. This is cruelty of a kind worse than that of physical violence.[3]

In one case the Kerala High Court observed : The general rule in all questions of cruelty is that the whole matrimonial relations of the parties should be considered especially when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusation or taunts. Any conclusion with reference to the change of cruelty alleged must be reached only after a consideration of the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining the question regard must be had to the circumstances of each particular case, keeping away in view the physical and mental condition of the parties and their character and social status. Whatever might have been the view in the past, the present tendency is in favour of the view that any conduct of the husband which causes disgrace to the wife and annoyance and indignity amounts to legal cruelty. The harm apprehended may be mental suffering as distinct from bodily injury, for pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind than if in heat of anger he were to inflict occasional blows upon her person.[4] Likewise the Calcutta High Court has pointed out that cruelty may be mental such as indifference and frigidity towards the wife, or physical like acts of violence and abstinence from sexual intercourse without reasonable cause. There are two sides to be considered in a case of cruelty, from the petitioner's side, ought this petitioner to be called upon to endure the conduct from the respondent's side, was this conduct excusable ? The Court has then to decide whether the sum total of the reprehensible conduct was cruel.[5] The question of mental cruelty should be decided in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status of the parties, their environment etc.[6] In *Siddagantayya* v. *Smt. Lakshmma*,[7] it is held that wilful and unjustifiable interference by one spouse in the sphere of the life of the other is one species of cruelty in the same way in which rough or dominnering conduct or unnatural sexual activities or disgusting accusation of unchastity or adultery and sometimes even studied unkindness or persistent nagging in a proper case can be regarded as cruelty. Cruelty about which the

1. *Ramesh Chandra* v. *Nandita*, (1979) 47 Cut LT 135 : 1979 (1) CWR 17.
2. *Rabindranath* v. *Pramila Bala*, AIR 1979 Orissa 85.
3. *Susanamma Kurian* v. *Varghese Abraham*, AIR 1957 TC 277.
4. *Sarah Abraham* v. *Pyli Abraham*, AIR 1959 Ker 75 : ILR (1958) Ker 643 ; *King* v. *King*, 1952 All ER 584.
5. *Jyotish Chandra Guha* v. *Meera Guha*, AIR 1970 Cal 226.
6. *Bijoli* v. *Sukamai*, AIR 1979 Cal 87.
7. AIR 1968 Mys 115.

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Act speaks is not restricted to acts of physical violence and may extend to behaviour which may cause pain and injury to the mind as well and so renders the continuance in the matrimonial home an agonishing ordeal.

Where the wife left her husband's house leaving a two months' old child and went to her parent's place and when approached not only refused to return to the husband's house to live with him but also refused to keep the child as a result of which the child died, the attitude of the wife amounted to cruelty entitling the husband to a decree of divorce on the ground of cruelty.[1]

The mere fact that in a prior suit for maintenance by the wife on the ground of cruelty there was a compromise and the wife agreed to go back to the husband and live with him does not prevent the Court in a subsequent petition based on cruelty to consider the prior acts of cruelty and that the compromise was a kind of provisional arrangement in an attempt to see whether an amicable matrimonial life was possible. The prior compromise and conduct would not amount strictly to such a condonation of the offence as to preclude the Court from finding cruelty for ordering judicial separation based on the fresh evidence taken along with the evidence of conduct of the husband prior to the compromise.[2]

8. Cruelty during separation.—Even when the parties are living separately it is possible for either party to commit acts of cruelty on the other, as for instance in *Britt* v. *Britt*.[3] In the case the wife and the husband were living separately and several months after such separation the husband visited the matrimonial home where the wife was living and gave her a good beating as a result of which she got black eye and again hit her when he subsequently met her in an omnibus. It was held that these acts were sufficient to establish cruelty even though they were committed when the parties were living apart.

9. Cruelty by refusal to have children.—Permanent and unreasonable starvation of the maternal instinct in the wife to have children, by the husband deliberately and without good reason, permanently denying his wife of a fair opportunity of having a child, by his practice of coitus interruptus, a course which, while preserving to himself a measure of sexual enjoyment, is a deliberate act contrary to the laws of nature and one which any reasonable husband must realise is likely to affect the wife's health, is cruelty.[4] Similarly in *Forbes* v. *Forbes*,[5] where a wife deliberately and consistently refused to satisfy the husband's craving to have children by insisting on the use of contraceptives and it was found that the wife was not unfit for child birth and that this intentional and persistent conduct on her part had caused the husband anxiety and misery resulting in his mental ill-health to the knowledge of his wife, it was held that the wife was guilty of cruelty to her husband. To the same effect is the decision in *Ward* v. *Ward*.[6]

Where the husband's sister, husband himself and his parents were always crazy to have a child in the family but the wife always dashed their hopes by resorting to termination of pregnancy. That conduct of the wife

1. *Gurcharan Singh* v. *Sukhdev Kaur*, AIR 1979 P & H 98.
2. *Jeevaratnammal* v. *Srinivasa Mudaliar*, AIR 1964 Mad 482.
3. (1955) 3 All ER 769.
4. *Knoti* v. *Knoti*, (1955) 2 All ER 305.
5. (1955) 2 All ER 311.
6. (1958) 1 WLR 693.

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undoubtedly amounts to cruelty if not physical, mental at least, and the husband was well within his right to claim the decree of divorce on that ground.[1]

10. Cruelty by words.—It is implicit in law that in order to find cruelty proved, it is not necessary to find physical violence. Cruelty by words, by talk, or by conduct other than violence may be cruelty nonetheless and possibly may even be more dastardly cruelty than the cruelty of blows. Nagging will suffice if persistent. Abuse, harsh language, conduct of that kind may well be cruelty provided always it causes either injury to health or a reasonable apprehension thereof. In order to establish cruelty it is essential to judge every act in relation to its attendant circumstances, the condition or susceptibilities of the innocent spouse, the intention of the offending spouse and that spouse's knowledge of the actual or probable effect of the offending conduct on the other's health.[2] Mere mental cruelty without causing bodily injury will not be sufficient, though mental cruelty affecting bodily health will be sufficient.[3] The disinterested testimony of witnesses to the effect that they had seen respondent and other person sleeping together in nights is held sufficient proof of adultery.[4] Clause (iv) only gives right to repudiate marriage after attaining age of 15 years and before completing 18 years and hence petition for dissolution of marriage by wife after completing 18 years of age is maintainable and there is no unnecessary and imporper delay in instituting proceedings.[5] Impotency of husband amounts to cruelty and wife is entitled for maintenance.[6] The husband obtaining decree for restitution of conjugal rights against the wife and the wife was ready and willing to comply with the decree and there was total reluctance of husband to resume cohabitation held the application for divorce after prescribed period under Section 13 (1-A) is over. The reluctance of husband is not a 'wrong' within Section 23 (i) (a) which would disentitle him from getting divorce decree.[7] In a divorce on the ground of desertion on the part of wife, the wife is not disentitled from claiming permanent alimony and maintenance.[8]

11. Recent case-law.—A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. Wilful denial of sexual relationship by a spouse when the spouse is anxious for it would amount to mental cruelty. Similarly hysterical and psychological repulsion to sexual intercourse may not in every case amount to wilful denial of sex by one spouse to another where the wife refused to continue her treatment for frigidity and refused to discharge her matrimonial obligations and also made false complaints to husband's superiors which would have affect of bringing him down in the eyes of the superior, refusal of wife to fulfil her matrimonial obligations coupled with her making of complaints amounts to cruelty. If the wife leaves the matrimonial house without husband's consent and the husband filing petition for annulment before expiry of two years after separation can-

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1. *Smt. Satya* v. *Siri Ram*, AIR 1983 P & H 252 at p. 253 ; 1983 Hindu LR 117 ; 1983 Marriage LJ 153.
2. *Cooper* v. *Cooper*, (1954) 2 All ER 450.
3. *Dwarakabai* v. *Nainar Mathews*, AIR 1953 Mad 792.
4. *M. Akkamma* v. *M. Jagannadham*, AIR 1981 AP 269 (DB).
5. *Bathula Iylaih* v. *Bathula Devamma*, AIR 1981 AP 74 (DB).
6. *Siraj Mohmed Khan* v. *Hafizunnisa*, AIR 1981 SC 1972.
7. *Smt. Gurmeet Kaur* v. *Harbans Singh*, AIR 1981 P & H 161.
8. *Rajendra Prakash* v. *Smt. Roshnidevi*, AIR 1981 P & H 212.

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not be decreed because offence of desertion is not estabilised as husband denied opportunity to wife to return home before deadline and terminated desertion.[1] Where husband used to beat wife and did not even permit her talk to any neighbour ; male or female and thereatened that she would be put to death in case she talks to anybody, the cruelty was held to be established. The delay in itself is not fatal to filing of petitions under the Act if reasonable explanation is given.[2] The allegations in written statements by wife in the divorce petition by husband could not effort any cause of action by any relief on the husband's petition for divorce. The allegations of adultery must be deemed to have been condoned by subsequent cohabitation between husband and wife. The relief of dissolution of marrige by a decree of divorce, specified either of clauses (i) (ii) of sub-section (1-A) of Section 13 cannot be obtained in the same proceedings in which the decree for judicial separation or restitution of conjugal rights has been passed.[3] The allegations of adultery made against a spouse in a written statement does not by itself amount to cruelty. The petitioner must establish falsity of such allegation in order that it may constitute cruelty.[4] The wife became pregnant after husband had undergone vasectomy operation. It was claim by husband in divorce petition that the wife became pregnant by illicit intercourse. It was held that the decree for divorce cannot be sustained as success of vasectomy operation was not proved and no case was made out by the husband that he had no sexual intercourse with the wife during the period she could have conceived. Also allegation of illicit relations not repeated on oath in witness box. The presumption is that the husband was the father of the child.[5] When the wife was pregnant and left for father's house it did not constitute desertion even though she left without husband's consent. The Court must look for the existence of two elements to find out desertion; first the factum of physical separation and second the *animus deserendi, i.e.* the intention to bring cohabitation permanently to an end.[6] False charge of adultery made by wife and husband not stating that it caused him mental anguish and false charge made in relation to false charge of incest against wife. It was held that false charge against husband did not constitute cruelty so as to entitle the husband for decree of divorce.[7] Husband himself living the wife at her parent's house and parents not wanting her and persuading her to live in matrimonial home despite harsh attitude of husband and wife herself keen on making her home even though husband charged her with incest and left her with her parents. It was held that there was no desertion by wife and husband was not entitled to divorce.[8]

The words "or" has been used after expression "has been incurably of unsound mind" meaning in Section 13 (1) (iii). The averment in plaint that wife became incurably of unsound mind and that she is also intermittently suffering from mental disorder—plaint is defective as wife cannot become

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1. *Smt. Shakuntala Kumari* v. *Omprakash Ghai*, AIR 1981 Delhi 53.
2. *Smt. Kaushalya Devi* v. *Masatram*, AIR 1981 HP 63.
3. *Sadan Singh* v. *Resham*, AIR 1982 All 52.
4. *Parasram* v. *Kamlesh*, AIR 1982 P & H 60 (DB).
5. *Chandramathi* v. *Pazhetli Balan*, AIR 1982 Ker 68 (DB).
6. *P. Indradevi* v. *Kumaran*, AIR 1982 Ker 78 (DB) : (1982) 1 Civi LJ 199 (Ker).
7. *Smt. Pushparani* v. *Krishnlal*, AIR 1982 Delhi 107.
8. *Ibid.*

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incurably of unsound mind and cannot at the same time intermittently suffer for mental disorder. '*Schizophrenia*' is an illness of slow insidious on set developing over years. There may be report of strange, odd inappropriate behaviour. There will be progressive deterioration in the level of performance at work and socially ; school report, examination results and the employment record will provide objective and usually raliable indices of intellectual performance, its maintenance or decline. According to clause (iii) of the section, two elements are necessary to get a decree of divorce. The party concern must be of unsound mind or intermittently suffering from *Schizophrenia* or mental disorder. At the same time that disease must be of such a kind and of such and extend that the other party cannot reasonably be expected to live with her. So only one element of that clause is insufficient to grant a decree. There is no provision under the Act to compel wife for medical examination. Adverse inference cannot be drawn on her non-examination when wife was examined twice and the matter would not have improved by her examination again by doctor. Even non-examination of mother of wife cannot raise any adverse inference. The husband has to prove his own case.[1] An application under Section 12 by husband seeking decree of nullity of marriage, on the ground that wife had failed to give birth to a child and that she had not been keeping good health, is not maintainable, as the grounds mention in the application were not grounds for divorce under Section 13 of the Act. The annulment of marriage was sought in 1978 for alleged fraudulent obtaining of consent in marriage in 1973 and if the delay is not explained relief must be refused for laches.[2]

In a divorce proceeding, the husband should specifically plead acts of cruelty. No amount of evidence can be worked into on a plea which was never pleaded in the petition or written statement cannot be looked into as evidence. The cruelty has not been defined in the Act, but it is well-settled that the conduct should be grave and weighty so as to make cohabitation virtually undurable. It must be more serious than the ordinary wear and tear of marriage. The burden of proof about cruelty lies on the party asserting it. The desertion for a continuous period of two years prior to the preceding petition is mandatory.[3] The recording of satisfaction of decree on basis of statements of parties in Court that they were willing to live together does not tantamount to restitution of conjugal rights. There must be resumption of conjugal duties in fact.[4] When the wife persisting in baseless charges of immorality against husband, taunting him, filing complaints and writing anonymous letters against him and also causing him physical injuries ; it was held that husband's petition for divorce must be allowed.[5] The words "all petitions and proceedings in causes and matters matrimonials which are pending" as used in Section 39 (1) introduced by Amending Act must be construed to include all petitions and proceedings which have not been finally decided irrespective of whether they are pending in the original Court or in appeal at the commencement of the Amending Act. The clear admission of wife in letter written as to her having

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1. *Smt. Rita Roy* v. *Siteshchandra Roy*, AIR 1982 Cal 138 (DB) : (1982) 1 Civi LJ 455 (Cal).
2. *Smt. Shakuntaladevi* v. *Amarnath*, AIR 1982 P & H 221.
3. *Smt. Maya* v. *Brijnath*, AIR 1982 Delhi 240.
4. *Smt. Harbhagan Kaur* v. *Lt. Col. Bhagwant Singh*, AIR 1982 P & H 200.
5. *Smt. Lajwanti Chandhok* v. *O. N. Chandhok*, AIR 1982 Delhi (NOC) 111.

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intercourse with person other than husband after solemnization of marriage it must be held that adultery is proved.[1] The wife left the matrimonial home on the ground of paucity of accommodation and husband's refusal to live separately by living 14 members joint with the husband. Under the circumstances held that the act of wife amounted to desertion. In all probabilities by setting up two different establishments, which the family could ill-afford the entire family would be ruined.[2] The petitioner-husband persistently accusing his wife of unchastity and of loose moral character, as the result the wife was living separately on that ground it was held that such separation cannot be treated as desertion by the husband.[3] The decree for restitution of conjugal rights was appealed and cross objections filed but both were dismissed for want of prosecution. It was held that such dismissal amounted to recognition of existing decree of trial Court and period of one year in Section 13 (1-A) (iii) had to be reckoned from date of such decree.[4] The order of appellate Court suspending execution of decree of trial Court for restitution of conjugal rights for period of one month from date of withdrawal of appeal and cross-objection does not operate as a bar to filing of petition under Section 13 (1-A) (ii) within that period.[5] When the husband is wholly guilty of maltreatment to the wife no matrimonial misconduct is attributable even remotely to wife in a petition for divorce by the husband on the ground of desertion and Section 13-A is not attracted.[6]

A petition by husband for divorce on the ground of wife's cruelty was filed wherein the husband did not examine members of the family who were described at witnesses. The adverse inference can be drawn against the petitioner. 'Cruelty' within the meaning of Section 13 (1) (i) (a) of the Act is not confined to causing physical acts of cruelty but include mental cruelty. Persistent failure or inability on the part of a spouse to effectuate sexual intercourse without any reasonable cause may amount to cruelty. The petition by husband for divorce on the ground of cruelty alleging that there was persistent refusal by wife to have sexual intercourse with him. The amendment of the petition sought to incorporate plea of physical deformity or defect in wife under Order 6, Rule 17 of C. P. C. Amendment cannot be allowed, when parties have already adduced evidence in trial Court, which has pronounced its judgment. The petitioner, appellant then filed withdrawal petition in appeal and filing fresh petition on the ground of physical deformity. It was held that withdrawal cannot be granted as he cannot be allowed to get rid of adverse findings upon issues made by Court below.[7] In a case where marriage has been dissolved under Section 13 (1) (ia) on the ground that the wife was living in adultery or was leading an immoral life her application for

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1. *N. C. Dass* v. *Smt. Chin Mayee Dass*, AIR 1982 MP 120 (DB) : (1982) 1 Civi LJ 555 (MP).
2. *Smt. Indu Gupta* v. *Rajeshwar Pershad*, AIR 1982 Delhi 344.
3. *Sarla Sikrodia* v. *Dr. Krishnan Chandra Sikrodia*, AIR 1982 Raj 200 : (1982) 2 Civi LJ 203.
4. C. P. C., O. 23, R. 1 read with Section 2 (2).
5. *Motilal Madhavlal* v. *Padma Ben*, AIR 1982 Guj 254.
6. *Angrez Kaur* v. *Baldev Singh*, AIR 1980 P & H 171 reversed ; AIR 1982 P & H 339 (DB).
7. *Sankar Prasad Chowdhary* v. *Madhabi Chowdhary*, AIR 1982 Cal 474 (DB).

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permanent alimony may be dismissed on the ground that even after the decree of divorce she continues to lead such a life. Where, however, the evidence is that she had conceived during the period of desertion and delivered a child, her application for permanent alimony cannot be thrown out on that ground alone.

It is well settled that illicit conception by itself is not 'living in adultery'. It would, however, open to a husband whose marriage has been dissolved on the ground that wife had deserted him to prove while contesting that application that the wife lives in adultery.[1] In a petition for annulment of marriage on the ground that the wife was insane, no cogent evidence was produced to establish that at the time of marriage wife was of unsound mind or was suffering from some mental disorder. It was held that the petition is liable to be dismissed.[2] In a petition for dissolution of marriage on the ground of adultery the standard of proof of adultery is not as strict as in a criminal case. The proof beyond doubt is not required.[3] Adultery was to be proved mainly by circumstantial evidence and cannot be proved mainly by direct evidence. The burden of proof is on the person who made the allegations.[4] Further it was held that leveling of allegation of adultery without proper foundation and basis would constitute mental cruelty on the other spouse so as to enable that spouse to seek divorce on the ground of cruelty.[5] The *alibi* evidence of co-respondent cannot be believed in absence of pleading in that behalf. The respondent's wife in hotel cabin with her blouse and brassiers unhooked and co-respondent holding her breast in his hands would not by itself sufficient to prove adultery or cruelty.[6] The unfolded allegations were scandalous in nature and were amounting to cruelty. The wife by making such allegations had exceeded her right to protest against the alleged high-handedness of her husband and his family and it could not be said that the husband was taking any advantage of his own wrong. Hence decree for divorce in favour of husband was passed.[7]

"Cruelty" as ground for divorce means cruelty of such character as to amount to danger to life, limb or health bodily or mental as to give rise to reasonable apprehension of such a danger. The fact that Parliament thought it fit to amend the ground relating to cruelty and bring it on par with the concept of cruelty as it is found under the Special Marriage Act which makes it clear that by this amendment Parliament nullified the effect of the decision of the Supreme Court in *Dastane* v. *Dastane*.[8] The fact that the wife made serious allegations of infidelity against husband using obscene language and repeated them would itself not be a ground for divorce. The concept of cruelty under Section 13 (a)(ia) involves higher requirement than reasonable apprehension mentioned in Section 10 (1) (b) before amendment. The burden of proof in case of divorce is not higher than in case of judicial separation and it is not necessary to

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1. *Ramkishan Singh* v. *Smt. Savitridevi*, AIR 1982 Delhi 458.
2. *Smriti Kana Bag* v. *Dilipkumar Bag*, AIR 1982 Cal 547 (DB).
3. *Vinod Anand Lakra* v. *Smt. Belulah Lakra*, AIR 1982 Pat 213.
4. *Swayamprabha* v. *A. S. Chandrashekhar*, AIR 1982 Kant 295 (DB).
5. *Ibid.*
6. *P* v. *P*, AIR 1982 Bom 498.
7. *Smt. Kiran Kapoor* v. *Surinder Kapoor*, AIR 1982 Delhi 543.
8. AIR 1975 SC 1534.

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prove the case beyond reasonable doubt. The fact can be established by preponderance of probability. The husband alleging wife to be running on the road, quarrelling with family members, using abusive language against husband and his relatives and taking the children to office of the husband and living them there. The acts are in the nature of quarrels which are symptoms of wear and tear of married life and cannot be regarded as act of cruelty warranting a decree of divorce.[1] A decree on petition for restitution of conjugal rights or judicial separation passed against the party, is entitled to divorce under Section 13 (1-A). 'Wrong' referred to in Section 23(1)(a) has no application merely because party against whom earlier decree was passed applied for divorce. A wrong prior to the passing of the decree is not the wrong contemplated under Section 23 at all and the past conduct cannot be used as a valid defence against the petitioner seeking divorce under Section 13 (1-A) of the Act.[2] The decree for divorce is a judgment in *rem* as regards status but not as regards ground on which order is based.[3] Husband or a wife must present petition before a marriage could be dissolved by a decree of the Court.[4] For making out the ground of desertion under Section 13 (1) (ib) entitling the petitioner to a decree for divorce he should show that his wife kept away from his society without reasonable cause and without his consent or against his wish. He should further prove that there was no willful neglect on his part of his wife. If the aforesaid ingredient could not be established the petition will be dismissed.[5] A divorce being a Civil proceeding, anologies of criminal laws are not apt. Adultery can be proved by preponderance of probability.[6] In adultery cases, corroboration to husband's bare testimony is necessary. Amendment of 1976 Act affecting substantial rights has retrospective effect. The effect of Marriage Laws (Amendment) Act, 1976, does not change the position of cruelty. The relief available under amended law cannot be granted unless prayed for and petition amended accordingly.[7] When the wife is not caring to see the seriously injured husband in hospital, is cruelty and divorce can be granted.[8] The wife obtained judicial separation proving that the husband living with another woman. After a lapse of two years the husband sought a decree for divorce under Section 13 (1-A) further averring that they had not resumed cohabitation during the period, was held to be untenable in view of his wrong.[9]

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1. *Madanlal Sharma* v. *Smt. Santosh Sharma*, 1980 Mh LJ 391.
2. *Vatsala Niranjan Gulwade* v. *Niranjan Ramchandra Gulwade*, 1981 Mh LJ 917.
3. *Sukhdeo* v. *Radhabai*, CRA No. 102/75 dated 10-8-78 (Nagpur).
4. *Sahera Begum* v. *G. M. Ansari*, 1979 Bom CR 111.
5. *D. P. Gopala* v. *Pushpa Veni*, AIR 1982 Kant 329.
6. *Subrata Kumar Banerjee* v. *Dipti Banerjee*, AIR 1974 Cal 61; and *Sachindranath Chatterjee* v. *Smt. Nilima Chatterjee*, AIR 1970 Cal 38 held no longer good law in view of *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534; *Dr. Sarojkumar* v. *Dr. Kalyan Kanta Ray*, AIR 1980 Cal 374 (DB).
7. *Smt. Sulekha Bairagi* v. *Prof. Kamla Kant Bairagi*, AIR 1980 Cal 370 (DB).
8. *Rajendar Singh* v. *Smt. Taramati*, AIR 1980 Delhi 213.
9. *Soundaramal* v. *Sundara Nadar*, AIR 1980 Mad 294.

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Cruelty and desertion were the grounds provided for judicial separation under the Act as it stood prior to the Act No. 68 of 1976. Now by amendment, cruelty and desertion apart from being the ground for judicial separation have also been made grounds for divorce under Section 13. It is one of the principle and essential obligation on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. Married life without a sexual life will be a curse to the wife. Thus failure to, or inability to, or refusal to effectuate the sexual intercourse by the husband without any reason on the part of wife, would amount to cruelty. It may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. False accusation would also amount to cruelty as the same will lead to mental torture. Desertion is not from place but from the state of things.[1] Pendency of petition for dissolu ion of marriage under Section 5, Nair Act on the date of repeal ; right to obtain dissolution under Nair Act continues to be operative.[2]

From *Explanation* to Section 13 (i) it is clear that burden of proof is on the petitioner to show that the other spouse has deserted without reasonable cause and without consent or against the wish. The essentials of desertion are (1) factum of separation, (2) intention to bring cohabitation to end, (3) absence of consent and (4) absence of conduct giving reasonable cause to quit the matrimonial home. It is well settled that if one spouse by words and conduct compels the other spouse to leave matrimonial home, the former would be guilty of desertion though it is the latter who has physically separated from the other and has left the matrimonial home. A suit for divorce on the ground of desertion was dismissed due to failure to prove desertion. Subsequent relief for dissolution of marriage by divorce will be untenable and barred by the principle of *res judicata*.[3] Where wife is aggrieved by the conduct of mother-in-law and husband witnessed it as a helpless observer, cannot be characterised as 'cruelty' towards wife and she is not entitled for decree for divorce. There is a distinction between sacramental marriage and contractual marriage.[4] Both the parties were misbehaving with each other and were critical to each other's actions. In many marriages each party can, if it so wills, discover many a cau e for complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a cause for dissolution of marriage. Unruly temper of a spouse of matrimonial wranglings cannot be said to amount to cruelty, nor would it be sufficient that the other spouse is whimsical, exacting, inconsiderate and irrascible. Incompatibility of temperament, negligence for want of affection, wounding the feelings of the other, or expression of hatred or the like would not be regarded by themselves as cogent grounds for relief. Meanness, staingeiness, shiftlessness, selfishness or defects of temperament cannot themselves amount to cruelty. The Court has to take account of the ordinary weaknesses and failings and short coming and should not be satisfied unless grave and substantial causes are established. Unhappiness in marriage *per se* a'so does not amount to cruelty. The Court has to bear in mind that husband and wife are made for each other and there is no question

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1. *Dr. Srikant Rangacharya Adya* v. *Smt. Anuradha*, AIR 1980 Kant 8 (DB).
2. *Gopala Nair* v. *R. Sarasamma*, AIR 1980 Ker 109 (DB) ; *G. Madhavan Nair* v. *S. Radhamony*, AIR 1979 Ker 152 overruled.
3. *Devisingh* v. *Smt. Sushiladevi*, AIR 1980 Raj 48.
4. *Gopal Sharma* v. *Dr. Mithilesh Sharma*, AIR 1979 All 316,

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of give and take policy between them.[1] The mere fact that some male relation writes improper letters to a married woman, does not necessarily to prove that there was any illicit relationship between woman who received them.[2] The sanctity of marriage is, in essence, the foundation of civilization and, therefore, Court and counsel owe a duty to society to strain to utmost to repair the snapped relations between the parties. This task becomes more insistent when an innocent off-spring of the weeding struggles in between the disputed parents.[3] The grounds for granting relief under Section 13 including sub-section (1-A) are subject to the provisions of Section 23 of the Act. In order to be a 'wrong' within the meaning of Section 23 (1) (a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of re-union by the husband, it must be misconduct serious enough to justify denial of the relief to which the husband of the wife is otherwise entitled.[4] If the wife is suffering from incurable form of leprosy, the husband is entitled to a decree for divorce.[5]

12. Cruelty by deception.—Where a man who had married twice before with the marriage is dissolved represented to the petitioner that he was a bachelor and induced her to marry and subsequently was misconducting himself and all this information came to the petitioner on inquiry with a shock which undermined her health, it was held that the husband's conduct amounted to cruelty justifying relief to the wife on that ground.[6]

13. Incapacity to work or provide money or home, when cruelty.—While refusal of husband to give money to wife and asking her to get food for credit thereby leaving her to face the demand from creditors may not amount to cruelty.[7] Where the husband refused to help the wife or to earn money, did no work, had debts and pressing creditors and left his wife to support the household whereby her health deteriorated, it would amount to persistent cruelty.[8] If without just cause or excuse the husband or the wife persists in doing things which she or he would not tolerate and which no ordinary person will tolerate it will amount to cruelty. If, for instance, the husband is lethargic, does no work, is parasitical, selfish or callous, provides no money for the household or refuses to undertake paid employment to meet household expenses i.e, on the ground of cruelty is like to meet the same fate as Gollins did in England.[9]

14. Wife's cruelty ; Perspective and illustrative cases.—In judging what is cruelty no distinction between the spouses is made and the standard of judging is not different. Some trends in judicial thinking, however, fail to be noticed. For one thing, a wife's violence may not ordinarily produce as serious an impact on the body and mind of the husband as the husband's violence

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1. *Rameshchandra* v. *Smt. Nandita Ray*, 1980 Hindu LR 205 ; ILR (1978) 2 Cut 596.
2. *Smt. Chandramohini* v. *Avinash Prasad*, AIR 1967 SC 581.
3. *V. K. Gupta* v. *Smt. Nirmala Gupta*, 1979 UJ (SC) 722.
4. *Dharmendrakumar* v. *Ushakumari*, AIR 1977 SC 2218.
5. *Swarajyalakshmi* v. *Dr. G. G. Padmarao*, 1973 UJ (SC) 903.
6. *Carpenter* v. *Carpenter*, (1955) 2 All ER 449.
7. *Estland* v. *Estland*, (1954) 3 All ER 966.
8. *Gollins* v. *Gollins*, (1964) AC 644 : (1963) 2 All ER 966.
9. Per L. S. Mehta, J. in AIR 1964 SC (Journal) p. 102.

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towards his wife. Secondly in judging the wife's cruelty the Court should consider not only whether violence on her part was likely to endanger the safety of the husband but whether it was not likely to imperil her own safety by provoking retaliatory action by the husband.[1] The need to have regard to the mind of the petitioner requires the Court to consider also the greater proneness of a woman to psychological injury.[2] All circumstances which constitute, the occasion or setting for the conduct complained of have relevance but no assumption can be made that the respondent (wife) is the oppressed and the petitioner (husband) is the oppressor. The evidence in any case ought to bear a secular examination.[3] In the *Dastane's case*, the wife took delight in causing misery to her husband and willingly suffered the calculated insults hurled at him and his parents by her relatives. In her outbursts of temper she accused falsely "the pleader's sanad of that old bag of your father was forfeited". She cried out "I want to see the ruination of the whole Dastane family" "burn the book written by your father and apply the ashes to your forehead" ; "you are monster in a human body" ; "I will make you loose your job and publish it in the Poona newspapers". These coupled with acts like the tearing of the mangala sutra, locking out the husband when he was due to return from his office, rubbing chillie powder on the tongue of an infant child beating a child mercilessly while in high fever, and switching on the light at night and sitting by the bedside of the husband merely to nag him were held to clearly amount to cruelty which tended to destroy the legitimate ends and objects of matrimony. The acts were of so grave an order as to imperil the husband's sense of personal safety, mental happiness job satisfaction and reputation. Where a wife was given to abusing her husband in public catching hold of his collar, make him cook for her and when he served threw the plate on his head on the ground that it was not properly prepared and insisted on his asking for forgiveness, threatening to burn herself and give a false complaint so as to get her husband into trouble, catching hold of his neck when he was starting to the office with his colleague and preventing him from taking the instruments used for his work, stating before others that her husband may be killed in an accident so that she may get his insurance and provident fund amounts, it was held that these acts would make it impossible for the husband to live with his wife.[4]

Where the wife filed complaint against her husband in the criminal Court, the husband on being summoned on that complaint, was enlarged on bail. That the complaint was frivolous was apparent from the fact that for over two years it was not prosecuted and ultimately as no evidence was led by the complainant, it was dismissed and the accused was discharged. According to the trial Court, it was a retaliatory step by the wife as the husband had already taken the matter to the Court for custody of the minor children and, therefore, filing of the complaint containing allegations disclosing the commission of offences under Sections 323 and 506 of the Indian Penal Code, was considered innocuous. Therefore, the husband had a right to move the Court for custody of the minor children. That cannot be taken to be a provocation to file a criminal complaint against the husband on unfounded allegations merely by way of retaliation. The apprehension in the husband's mind that

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1. *Forth* v. *Forth*, 36 LJP & M 131 ; *Pickard* v. *Pickard*, 33 LJP & M 122.
2. *Kusum Lata* v. *Kamal Prasad*, AIR 1965 All 280.
3. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534, 1538.
4. *Sreepadchar* v. *Vasantha Bai*, AIR 1970 Mys 232.

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it will be harmful to live with the wife was reasonable. Therefore, that act amounted to cruelty as per the principles laid down by their Lordship in *Dr. N. G. Dastane* v. *Mrs. S. Dastane.*[1]

Acts of the wife like neglect of domestic duties making the husband on occasions to leave without food for the office, breaking her bangles, striking her head against the wall, throwing away articles, attempting to set fire to her clothes, using insulting language to her mother-in-law, failing to attend on her last illness, constant nagging of her husband, persistent insults to him etc. would amount to cruelty as would cause apprehension of harm or injury to him.[2]

Where a wife was suffering from epilepsy of a not incurable type, though it may cause mental pain to the husband, it cannot be said to cause reasonable apprehension in the mind of the husband that it would be harmful or injurious for him to live with her. It does not constitute cruelty as would afford ground for matrimonial relief.[3] Where a newly wedded wife was accused of unchastity by her husband and he drove her out of his house and on being sent again to his house by her parents, she attempted to commit suicide and in her written statement alleged that her husband administered poison, the wife's allegation in the circumstances did not constitute an act of cruelty and cannot serve as a ground for dissolution of the marriage.[4]

15. Burden and standard of proof in cruelty cases.—The burden lies on the petitioner to establish his or her case for, ordinarily the burden lies on the party which affirms a fact, not on the party which denies it. The petitioner must therefore prove that the respondent has treated the former with cruelty.[5] Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. It is wrong to import such consideration into trials of a purely civil nature. The section does not require the petitioner to establish the charge of cruelty beyond reasonable doubt. The Court goes by the preponderance of probabilities.[6]

16. Condonation of cruelty.—Condonation signifies forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the commission of the offence. To constitute condonation there must be two things: forgiveness and restoration.[6] Even if condonation is not pleaded as a defence by the respondent, the Court is under an obligation which has to be discharged even in undefended cases to find out whether the respondent's cruelty has been condoned by the petitioner,

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1. AIR 1975 SC 1534; *Mrs. Suresh Bala, Dehradun* v. *Major Gurmohinder S. Bala, New Delhi*, AIR 1983 Delhi 230 at p. 239; (1983) 1 DMC 45 : (1983) 4 Delhi Rep J. 53.
2. *Manijulabai* v. *Ramachandra*, 1975 MPLJ 692.
3. *Raghunath* v. *Vijaya*, ILR (1972) Bom 511 : 73 Bom LR 840; AIR 1970 Bom 182.
4. *Gurbachansingh Kaur* v. *Sardar Swaran Singh*, 1978 All LJ 284; AIR 1978 All 255.
5. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534.
6. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, *ibid*; *Champa Gauri* v. *Jamnadas Amrchana*, (1971) 1 APLJ 230.

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inasmuch as relief can be granted only if the Court is satisfied but "not otherwise", that the petitioner has not in any manner condoned the cruelty.[1] Sex plays an important role in marital life and cannot be separate from other factors which lend to matrimony a sense of fruition and fulfilment. Evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof of condonation by the other.[1] Intercourse is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and received back into the former position.[1] Subsequent conduct of the respondent, however, may be such as to revive the original cause of action.[1]

17. Desertion.—(i) *Meaning and ingredients.*—There can be desertion without previous cohabitation by the parties or without the marriage having been consummated.[2] "Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, "the home". There can be desertion without previous cohabitation by the parties or without the marriage having been consummated". The basis for this theory is built upon, it appears on a statement made by Lord Penzance in *Fitzgerald* v. *Fitzgerald*.[3] "No one can desert who does not actively or wilfully bring to an end the existing state of cohabitation."

Similarly, two elements are essential so far as the deserted spouse is concerned, (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. It is also held that the desertion is a matter of inference to be drawn from the facts and circumstances of each case. Further recently in *Dastane* v. *Dastane*,[4] the Supreme Court struck a different note about the standard of proof in matrimonial cause. It was held that proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trial or trials involving inquiry into issues of a quasi-criminal nature, and the proceedings under the Hindu Marriage Act, 1955 are essentially of a civil nature and the test of preponderance of probabilities is sufficient to discharge the burden. In view of the evidence of the mediators and the admitted fact of non-consummation of the marriage since inception and the reluctance of the wife to go to the husband's home for a statutory period would clearly establish the two essential elements of the factum of desertion and the *animus deserendi*.[5]

Desertion for a continuous period of not less than two years immediately preceding the presentation of the petition is a ground for divorce as well as judicial separation. The Explanation makes it clear that desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent and against the wish of such party, and includes

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1. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534; Cf., *Champa Gauri* v. *Jamnadas Amirchand*, (1971) 1 APLJ 230.
2. Vide *Halsbury's Laws of England*, Vol. 13, page 284, paragraph 576, Fourth Edition.
3. LR 1 P & M 694 at 698.
4. AIR 1975 SC 1534.
5. *Valluru Jyothi Lakshmi* v. *Valluru Venkata Siva Koteswara Rao*, 1983 (1) Civil LJ 211 at pp. 214, 215 (AP).

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the wilful neglect of the petitioner by the other party to the marriage.[1] In its essence it signifies the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage.[2] Desertion includes also the wilful neglect of one of the spouses by the other.[3] For the offence of desertion, so far as the deserting spouse is concerned two essential conditions must exist : (1) the factum of separation, and (2) intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.[4] Desertion is a withdrawal not from a place but from a state of things.[5] There can be desertion without previous cohabitation and there can be desertion without the marriage having been consummated.[6] Desertion is a matter of inference to be drawn from the facts and circumstances of each case.[7] Desertion as a ground of judicial separation or divorce differs from the other statutory grounds for such relief like adultery and cruelty in that the act giving rise to the cause of action is inchoate till the suit is instituted.[7]

Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion.[9] If a spouse leaves the other in a state of temporary passion, for

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1. *Chakradhar Mohanty* v. *Kumudini Devi*, 1971 (1) CWR 737.
2. *Lachman* v. *Meena*, AIR 1964 SC 40 ; See further *Labh Kaur* v. *Narain Singh*, AIR 1978 P & H 317 ; *Kirpal Singh* v. *Harbans Kaur*, AIR 1967 Delhi 19 ; *Rohini Kumari* v. *Narendra Singh*, AIR 1970 All 102 ; *Mallappa* v. *Neelawwa*, AIR 1970 Mys 59 ; *Chakradhar Mohanty* v. *Kumudini Devi*, supra.
3. *Mangalabai* v. *Deorao*, AIR 1962 MP 193.
4. *Bipin Chandar* v. *Prabhavati*, AIR 1957 SC 176 ; *Rohini Kumari* v. *Narendra Singh*, AIR 1972 SC 459 ; see also *Chakradhar Mohanty* v. *Kumudini Devi*, supra ; *Jasbir Kaur* v. *Ranjit Singh*, 1975 Punj LR 129 ; *Chity Venkamma* v. *Mahalakshmi*, (1976) 2 An WR 45 : (1976) 1 APLJ 207 ; *Parihar* v. *Parihar*, AIR 1978 Raj 140 ; See further *Lachman* v. *Meena*, supra ; *Tirupathi Rao* v. *Krishnamma*, (1970) 1 An WR 13 ; *Sunil Kumar* v. *Satiran*, AIR 1961 Cal 573 ; *Williams* v. *Williams*, (1939) 3 All ER 825 ; *Pratt* v. *Pratt*, LR (1939) AC 417 ; *Cohen* v. *Cohen*, LR (1940) AC 631.
5. *Khorshed* v. *Muncherji*, (1917) 39 Bom LR 1141, 1142 ; *Guha* v. *Guha*, AIR 1970 Cal 286.
6. *Chitty Venkamma* v. *Mahalakshmi*, supra.
7. *Lachman* v. *Meena*, supra ; *Bipin Chander* v. *Prabhavati*, supra ; *Chakradhar Mohanty* v. *Kumudini Devi*, supra.
8. *Sitabai* v. *Ramchandra*, AIR 1958 Bom 116.
9. *Rohini Kumari* v. *Narendra Singh*, AIR 1972 SC 459 : (1972) 1 SCJ 487 ; *Lila Devi Shrivastava* v. *Manoharlal Shrivastava*, AIR 1959 MP 449 ; *Rangaswamy* v. *Aravindammal*, AIR 1957 Mad 243.

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instance in anger or in disgust it will not amount to desertion.[1] Where the husband himself took his wife to her mother's home for confinement it is not a case of leaving the matrimonial home in order to deserting the husband.[2] Where due to circumstances like business or professional duties or mutual convenience the spouses were temporarily separated, there would be no question of desertion.[3] Mere refusal of matrimonial bed by wife is no desertion ; nor is it desertion to neglect opportunity for conserting with the husband.[4] To constitute desertion it must be established : (a) the spouses must have parted or terminated all joint living, (b) the deserting spouse must have an intention to desert the other spouse, (c) the deserted spouse must not have agreed to the separation, (d) the desertion must have been without cause, and (e) this state of affairs must have continued, for the requisite period.[5]

The quality of permanence is one of the essential elements differentiating desertion from voluntary separation.

(ii) *Intention to desert or abandon.*—In the *American Jurisprudence,*[6] it is stated : "In the determination of what constitutes desertion, one of the first matters for consideration is the intent of the offending party; there must be in addition to separation or withdrawal from cohabitation, an intent on the part of the withdrawing party not to return or resume cohabitation. The wrongful intent to desert is indispensable. A mere severance of the relation is not sufficient since there may be a separation without desertion and desertion without separation. Continued separation of husband and wife which may be consistent with no intention to wilfully and obstinately desert is not a desertion." Desertion does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without *animus deserendi* there can be no desertion.[7] When the factum and intention to desert have been established, such intention is presumed to continue unless the offending spouse proves genuine repentance and a reasonable attempt to go back to the deserted spouse.[8]

(iii) *Commencement of desertion.*—Since in addition to separation there must be the animus or intention never to return to conjugal society, the intention may supervene separation which might have started quite innocently. A *de facto* separation may take place without the animus as in separation by

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1. *Chakradhar Mohanty* v. *Kumudini Davi*, 1971 (1) CWR 737 ; *Labh Kaur* v. *Narain Singh*, AIR 1978 P & H 317.
2. *Bijoy* v. *Alaka*, AIR 1969 Cal 471.
3. *Thomas* v. *Thomas*, (1924) P. 194 (CA) ; *Chudley* v. *Chudley*, 69 LT 617.
4. *Bhagwanti* v. *Sodhu Ram*, ILR (1960) 1 Punj 579 ; AIR 1961 Punj 181.
5. *Rangaswami* v. *Aravindamma*, AIR 1957 Mad 243.
6. Vol. 17, p. 194.
7. *Rohini Kumari* v. *Narendra Singh*, (1972) 1 SCJ 487 : AIR 1972 SC 459 ; *Labh Kaur* v. *Narain Singh*, AIR 1978 P & H 317 ; *Sudarshan Singh* v. *Kuldip Kaur*, (1976) 78 Punj LR 129 ; *Jasbir Kaur* v. *Ranjit Singh*, 1975 Punj LR 129.
8. *Lachman* v. *Meena*, AIR 1964 SC 40 ; See also *Kirpal Singh* v. *Harbans Kaur*, AIR 1967 Delhi 19 ; *Mallappa* v. *Neelawwa*, AIR 1970 Mys 39.

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mutual consent or by compulsory separation. On the other hand there may be *animus deserendi* without separation as where the parties live as two households under the same roof.[1] The offence of desertion commences when the factum of separation and the *animus deserendi* co-exist.[2] It is not however necessary that they should commence at the same time.[3] Where the intention to abandon is formed subsequent to the separation, that intention will not relate back to the date of the prior separation for the purpose of desertion and the period of two years must be calculated only from the time the intention is manifested or proved to have formed. The onus of proof in this regard must be on the deserting spouse to show when exactly the intent was entertained since that is a matter which is specially within the knowledge of the deserting spouse. The initial presumption in the absence of circumstances to the contrary is that the intention to abandon and the factum of separation are simultaneous for the purpose of calculating the period of desertion.

(iv) *Cause for desertion.*—Causes leading to desertion may be many and varied, Ill-treatment by the husband or his misconduct making the wife miserable in the husband's home may in conceivable cases be ground for holding that the wife is justified in deserting her husband. Mere frailty and violence of temper, however uncontrolled and persistent, and gross and habitual intemperance and habits quite distasteful to the husband do not constitute reasonable cause for depriving the wife of the protection and comfort of the husband's home and society.[4] The consideration that in case, the husband remarries, the wife is entitled to separate residence and maintenance under statutory provision could not be utilised as a reason for concluding that the husband's remarriage must necessarily afford a reasonable cause for desertion.[5] Nor is the circumstance that the wife has run the husband into debts a ground for the husband abandoning the wife.[6] Serious allegations of unchastity made by the husband against his wife affords grave and weighty reason for the wife to live apart.[7] The following have been held to constitute sufficient grounds for desertion : confession of adultery by the wife,[8] wife permitting indecent liberties being taken by others with her,[9] unreasonable and persistent refusal by the wife to consummate the marriage,[10] persistence in the false charge of unnatural offence having been committed by the husband etc.

1. *Guha* v. *Guha*, AIR 1970 Cal 266.
2. *Chakradhar Mohanty* v. *Kumudini Devi*, (1971) 1 CWR 737 ; *Shyam Sundar Gautam* v. *Bimla Kumari Gautam*, (1978) 80 Punj LR 23 (Delhi).
3. *Chakradhar Mohanty*'s case, (1971) 1 CWR 737 ; *Devi Singh* v. *Sushila Devi*, AIR 1972 Raj 3 ; *Purshotam* v. *Devoki*, AIR 1973 Raj 3.
4. *X* v. *X*, ILR 22 Mad 328.
5. *Rohini Kumari* v. *Narendra Singh*, (1972) 1 SCJ 487 : AIR 1972 SC 459.
6. *Holloway* v. *Holloway and Campbell*, ILR 5 All 71 ; *Starbuck* v. *Starbuck*, 59 LJP & M 20.
7. *Lachman* v. *Meena*, AIR 1964 SC 40.
8. *Faulkar* v. *Faulkar*, 64 LT 834.
9. *Haswell* v. *Haswell*, 29 LJP & M 21.
10. *Synge* v. *Synge*, (1900) P. 180, on appeal (1901) P. 317.

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(v) *Desertion must be without consent or against the wish of the petitioner.*—To constitute desertion by a spouse his or her absence and the cessation of cohabitation by him or her must be without the other's consent and without reasonable cause.[1] A separation however long, with the consent or acquiescence of the petitioner, cannot constitute desertion for the purpose of a decree for judicial separation. Thus if a spouse, not entirely blameless for the other going away and living separately, makes no effort whatsoever to induce the other to return for joint living and asquiesces in and is content with the continuance of the separate living, he or she cannot be heard to complain and ask for judicial separation on the ground of desertion. A consent given by the petitioner for the separate living of the respondent either at the time of the departure of the respondent for such separate living or during the continuance of such separate living, will take away an essential ingredient of desertion. Besides, where the parties to a marriage after having lived together for some time after the marriage enter into an agreement for separate living it cannot be postulated that the separation constitutes desertion because, the essential element to constitute desertion, namely, separation against the wish or without the consent of the other spouse cannot be posited.[2]

The consent which will take away the necessary element may be expressed by a formal deed or by an agreement or it may be tacit or inferred from conduct. It is possible that a separation which began by consent may become desertion if the consent on both sides and the *animus deserendi* supervenes on the part of the respondent.[3] Where the separation is in pursuance of an agreement in writing, but the agreement has not been acted upon and the parties thereto continued to cohabit even thereafter, a subsequent separation without the consent and for no justification, will amount to desertion, and the agreement in writing cannot avail to support the plea of consent for separation. So also, if the agreement has been obtained by fraud or force or has been put an end to by both the parties, that agreement will not be an answer to the charge of desertion. It must be remembered that in respect of an agreement for separate living between the parties, there is a distinction between an agreement for separate living entered into before the marriage, and one entered into after the marriage, and during the continuance of cohabitation. The former agreement, namely, an agreement entered into before the marriage to the effect that the parties shall not live together cannot be banked upon as an answer to the charge of desertion because such an agreement is void as opposed to public policy; but the latter agreement can be founded upon as valid defence to an allegation of desertion.[4]

It is for the party seeking to establish desertion to give evidence of conduct on his or her part showing that the separation was without the consent of the party alleging desertion and against such party's wishes.[5]

Where the decree for restitution of conjugal rights was passed on 27-10-1976. Shortly thereafter the wife filed suit for maintenance on the

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1. *Bai Appibai* v. *Khimji*, 38 Bom LR 77.
2. *Mary D'Rozario* v. *Ernest D'Rozario*, AIR 1941 Bom 372.
3. *Pardy* v. *Pardy*, (1939) 3 All ER 779 (CA).
4. *Vadranam Tirupathi Rao* v. *Krishnamma*, (1970) 1 An WR 13.
5. *Fowle* v. *Fowle*, ILR 4 Cal 260; *Ward* v. *Ward*, 27 LJP and M 63; See also *Shyam Gautam* v. *Bimla Kumari Gautam*, (1978) 80 Punj LR 23 (Delhi); *Sudarshan Singh* v. *Kuldip Kaur*, (1976) 78 Punj LR 371.

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ground that she was entitled to live separately on account of the cruelty meted out to her by the husband. Obviously, the suit was filed in 1972, and the allegations were that she was driven out of the house and that she was ill-treated by the husband. The suit was decreed on 5-4-1974, finding the allegations to be true. In those circumstances, there can be no question of any desertion on the part of the wife. The decree for maintenance had become final as there was no appeal against the decree. From the facts it was clear that the wife was living away from the husband from 1972 due to the ill-treatment of the husband and a competent court had held that she was entitled to live separately. In those circumstances, the wife was not guilty of desertion. The petition for divorce was filed in 1976. In view of the maintenance decree in suit of 1972 which had become final between the parties, the ground of desertion on the part of the wife stands disproved.[1]

(vi) *Constructive desertion.*—If one spouse by words and conduct compels the other to quit the matrimonial home the former will be guilty of desertion though it is the latter who has physically separated from the other and left the matrimonial home.[2] The spouse responsible for creating the situation in which the other spouse is forced to stay away is guilty of constructive desertion.[3] Constructive desertion is the expression used to show that the spouse who forces the other to leave him or her is guilty of desertion even though the party going away from the matrimonial home is the other party. In deciding the question of desertion, the Court has to look at the conduct of both the spouses and it must be remembered that there is no substantial difference between a husband leaving his wife *animus deserendi*, and a husband who by his conduct with like intention brings cohabitation to an end by compelling his wife to depart from the matrimonial home.[4]

It would be constructive desertion where the wife made her husband believe that she had committed adultery and thereupon he left the matrimonial home.[5] A mere wish that the other spouse should leave is insufficient by itself to constitute constructive desertion.[6]

The question of desertion cannot be decided by merely enquiring which party left the matrimonial home. The husband may well live in the place but made it absolutely impossible for the wife to live there, and if in that state of things the wife leaves the matrimonial home that has deserted the husband.[7] The position has been succinctly stated in the *American Jurisprudence*, Volume 17 at page 201 as follows :

> "Usually the spouse who withdraws from cohabitation or absents himself from the other spouse is the one chargeable with desertion.

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1. *Geeta Lakshmi* v. *G. V. R. K. Sarveswara Rao*, AIR 1983 AP 111 at p. 112 : (1982) 2 APLJ 405 : 1982 LS (AP) 239 : (1983) 1 Andh LT 118 (HC).
2. *Bipinchandra* v. *Prabhavati*, AIR 1957 SC 176, 187-188 ; *Rohini Kumari* v. *Narendra Singh*, (1972) 1 SCJ 487 : AIR 1972 SC 459 ; *Lang* v. *Lang*, (1954) 3 All ER 571.
3. *Tara Chand* v. *Narain Devi*, AIR 1976 P and H 390.
4. *Mangala Bai* v. *Deorao Gulabrao*, AIR 1962 MP 1963.
5. *Baker* v. *Baker*, 1954 P. 33, 35 ; (1962) 106 Sol Jo 573.
6. *Charter* v. *Charter*, (1901) 84 LT 272 ; *Buchler* v. *Buchler*, (1947) 1 All ER 326.
7. *Shrivastava* v. *Mannoharlal*, AIR 1959 MP 349 ; See also *Dina* v. *Dinshaw*, ILR (1969) Bom 1043 ; 72 Bom LR 41 ; AIR 1970 Bom 341.

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However, this is not necessarily true. Either spouse may by reason of misconduct or cruelty drive the other away, in which case the former, and not the latter is the deserter or is guilty of desertion. In other words, the conduct of one of the parties, may justify separation from him or by the other and confer the right upon the latter to obtain a divorce upon the ground of wilful desertion. Thus, if a husband by his extreme cruelty to his wife compels her, for her own safety and protection, to seek a home elsewhere than under his roof, she does not thereby desert him, within the meaning of the statute, on the other hand, under such circumstances, he is chargeable with the offence of deserting his wife, and she may obtain a divorce on that ground. The same principle applies where the husband is forced to leave his wife on account of her cruelty. The rule that cruelty on the part of the husband which justifies the wife in separating from him may constitute desertion on his part and entitle the wife to a divorce on the ground of desertion is not open to the objection that it gives the wife a remedy greater than the statute provides, namely, an absolute divorce instead of a limited divorce.

To constitute constructive desertion, it is not necessary to show that the defending spouse misconducted himself or herself with the intention of forcing the other to leave the home; nor is it necessary that there should have existed in connection with the acts of cruelty and settled purpose to drive away the other. It is enough if such is the natural consequence of the acts. The complaining spouse must, of course, be justified in leaving the defending spouse in order to constitute such desertion by the latter. It has been held that to justify the separation and to entitle the complaining spouse to a divorce on the ground of desertion, the conduct of the guilty party must have been such as to afford ground for a limited divorce. Some Courts have gone to the extent of holding that in order to constitute constructive desertion, it must have been such as would, in itself, have been a ground for an absolute divorce. In many jurisdictions, however, the rule adopted does not require the misconduct to be such as in itself would have been a ground for divorce."

The conduct of the husband living with a concubine or marrying a second time will not operate *ipso facto* as a reasonable cause. It must be proved that the conduct of the husband has produced an impact on the mind of the wife so as to cause her to continue to live apart and continue the desertion. If a desertion has already taken place by the deserting spouse the subsequent conduct on the part of the deserted spouse cannot be relevant, and the subsequent conduct of the deserted spouse cannot constitute a reasonable cause to justify the conduct of deserting spouse.[1]

(vii) *Wilful neglect and desertion.*—The Explanation to Section 10, says that desertion includes the wilful neglect of the petitioner by the other party to the marriage: "Wilful" means "on purpose", "intentional" and "neglect" means neglect in the discharge of marital obligations of consortium and

1. *Valluru Jyothi Lakshmi* v. *Valluru Venkata Siva Koteswara Rao*, (1983) 1 Civi LJ 211 at pp. 216, 217 (AP).

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cohabitation.[1] It is possible to have wilful neglect inferred even when the parties are living under the same roof where the deserting spouse does not discharge the duties of the husband or wife to the other spouse.[2] The mere fact that a husband has made suitable allowance for the wife is no answer to a charge of desertion against him because a wife is entitled not only to maintenance by receiving food, shelter and raiment at his hand, but she is also entitled to the protection and society of her husband. Thus where a husband has separated from his wife without her consent but has been paying intermittent visits to her without resuming marital intercourse it may come under wilful neglect.[3] The wilful neglect of the husband regarding his wife will include also the failure of the husband to provide the wife, though living with him, the funds for subsistence consistent with his meant and income. But the failure on his part to provide the necessary funds for running the home due to his inability and indigence and not because he intends or desires to see her starve will not amount to wilful neglect constituting desertion under this section.[4]

(viii) *Desertion must be for a continuous period of not less than two years.*— For succeeding in a petition for judicial separation or divorce on the ground of desertion by the respondent, it is necessary for the petitioner to prove that the desertion has lasted for a continuous period of two years or more immediately preceding the presentation of the petition. Two things are essential, namely, that the period of not less than two years should be shown as the period during which the desertion has continued and that the said period is one without any break. If the petition is filed within this period, then it has to be dismissed as premature even though at the time of hearing two years had elapsed. Thus in a case where before the expiry of the period of two years the husband who had deserted his wife and was living away from her, *bona fide* offers to return to her and resume cohabitation, his absence is deprived of the character of desertion and the onus of showing that the offer is not *bona fide* is on the petitioner.[5] Once the desertion for a period of not less than two years is completed the deserted party acquires a complete right to relief and a *bona fide* offer made thereafter by the forsaking party to resume cohabitation will not deprive the separation of its character of desertion.[6] Desertion not being a specific act but a continuing course of conduct, it must be shown to have continued for the statutory period without any interruption, conduct, it must be shown to have continued for the statutory period without any interruption therein, and two periods of desertion interrupted by a reconciliation cannot be added together for the purpose of making up the period required by the section.[7] If the deserting spouse becomes insane before the termination of the requisite period, desertion cannot be said to have continued for the requisite period, since the time during which the insanity continued cannot be considered and included in computing the period of desertion. So also if before the expiry of the period

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1. *Mangala Bai* v. *Deorao Gulabrao*, AIR 1962 MP 1963.
2. *Smith* v. *Smith*, (1940) P. 49 ; (1939) 4 All ER 533 ; *Powel* v. *Powel*, (1922) P. 278
3. *Thurstan* v. *Thurstan*, 26 TLR 388 ; *Macdonald* v. *Macdonald*, 4 S and T 242.
4. *Georgains* v. *Edward Nathaid*, AIR 1955 All 8.
5. *Martin* v. *Martin*, 78 LT 568.
6. *Cargil* v. *Cargil*, 27 LJP & H 61 ; *Parumul Naicker* v. *Sithalakshmi Ammal*, AIR 1956 Mad 415.
7. Cf., *Sitabai* v. *Ramchandra*, 59 Bom LR 885.

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of desertion, the spouses enter into an agreement for separate living, the separation ceases to be desertion as from the date of the agreement. Besides any supervening conduct on the part of the deserted spouse which is an effective and reasonable cause in preventing the deserting spouse from returning to cohabitation is an answer to the petition as for instance if the wife has been deserted by the husband and the wife during the period of desertion commences to live in adultery or is guilty of other acts which will be reasonable grounds for the husband not returning to cohabitation with the wife, the husband cannot be held to be guilty of desertion from the date of his knowledge of the wife's misconduct. Therefore, the following should be established for the maintainability of the petition regarding the requisite period of two years under the section :

(a) the period of two years of desertion must be immediately proceeding the petition for judicial separation or divorce ;

(b) that period must be continuous and unbroken by reconciliation and resumption of cohabitation ;

(c) there should be no agreement to live separately during the said period ;

(d) the deserted spouse should not be guilty of any act or misconduct giving cause for the deserting spouse not to resume cohabitation ;

(e) the deserting spouse must be of sane mind during the entire period of not less than two years of separate living.

(ix) *Termination of desertion.*—It is necessary that during the entire period of desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.[1] And it is open to the deserting spouse at any time before the other spouse petitions for judicial separation or divorce to terminate the desertion by resumption of cohabitation or genuine offer of reconciliation.[2] Reinstatement cannot be refused in such a case.[3] Casual acts of sexual intercourse during the period will not be proof of resumption of marital relationship where the deserting spouse, though party to such acts, has in all other respects repudiated the relationship.[4]

(x) *Defence to action on ground of desertion.*—Matrimonial offence by one spouse would justify desertion by the other.[5] Even conduct falling short of matrimonial offence may, in some cases be a good defence.[6] Thus conduct falling short of legal cruelty may yet be such as to justify the other spouse in going away from the matrimonial home.[7]

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1. *Lachman* v. *Meena*, AIR 1964 SC 40 ; Cf., *Kako* v. *Ajit Singh*, AIR 1960 Punj 328.
2. *Bipin Chandra* v. *Prabhavati*, AIR 1957 SC 176.
3. *Perry* v. *Perry*, (1952) 1 All ER 1076.
4. *Samir Kumar Banerjee* v. *Sujata Banerjee*, (1966) 70 Cal WN 633.
5. *Maw* v. *Sadhu*, AIR 1961 Punj 152 ; *Glenister* v. *Glenister*, (1945) 1 All ER 413, 520.
6. *Meena* v. *Lachman*, 61 Bom LR 1549.
7. *Edwards* v. *Edwards*, (1949) 2 All ER 145.

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(xi) *Effect of condonation of desertion.*—Under Section 23(1) (b) condonation may be fatal to prayer for relief. Desertion for a period of not less than two years before the presentation of the petition, if condoned, cannot be revived.[1] Whether cohabitation while proceedings are pending amounts to condonation or is but an attempt at reconciliation would depend on the facts of the case.[2]

(xii) *Burden and standard of proof.*—The petitioner must show that the desertion was without reasonable cause.[3] He must also show that it persisted throughout the entire prescribed period.[4] The burden lies on the petitioner to establish the factum of separation as well as the intention (*animus deserendi*) throughout such period.[5] Desertion like other facts must be proved on the preponderance of probabilities.[6] The facts have to viewed as to the purpose which is revealed by those acts or by conduct and the expression of intention both anterior and subsequent to the actual acts of separation. If in fact there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*.[7] So long as there was some evidence on the strength of which the Court could be satisfied about desertion, the grant of relief will not be disturbed.[8] Once it is found that one of the spouses has been in desertion, the presumption is that the desertion has continued.[9] Before granting a decree as prayed for the Court should be satisfied that the requirements of Section 23 are met.[10] The resumption of cohabitation within the meaning of Section 13 (1-A) is not an unilateral attempt made by one of the spouses against the will of the other to resume cohabitation. To take such a view of Section 13 (1-A) is to introduce into that section a number of mischiefs which the Parliament did not contemplated. Though the husband might be morally wrong in not resuming cohabitation when the wife wanted it and whereby wanted to bring about reconciliation still the law entitled the husband to resist the attempt of his wife to resume cohabitation, after decree for judicial separation, and can get decree for divorce. After decree for divorce is passed, the wife can apply for maintenance or alimony which can be granted for the wife, taking into consideration the conduct of the parties after decree for divorce will passed. The mere fact that the wife unjustly deserted the husband is not so abomirable as to disentitle her from claiming any maintenance whatsoever.[11]

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1. *Perry* v. *Perry*, (1952) 1 All ER 1076.
2. *Samir Kumar Banerjee* v. *Sujata Banerjee*, (1966) 70 Cal WN 633.
3. *Lachman* v. *Meena*, AIR 1964 SC 46; *Rohini Kumari* v. *Narendra Singh*, AIR 1972 SC 459; *Labh Kaur* v. *Narain Singh*, AIR 1978 P & H 317.
4. *Bipin Chandra* v. *Prabhavati*, AIR 1957 SC 176.
5. *Parihar* v. *Parihar*, AIR 1978 Raj 140; *Jasbir Kaur* v. *Ranjit Singh*, 1975 Punj LR 129.
6. *Shyam Sundar Gautam* v. *Bimla Kumari Gautam*, (1978) 80 Punj LR 23 (Delhi); *Sudarsan Singh* v. *Kuldip Kaur*, (1976) 78 Punj LR 391; *Shyam Narain* v. *Sahib*, (1978) 4 ALR 882.
7. *Chakradhar Mohanty* v. *Kumudini Devi*, (1971) 1 CWR 737.
8. *Ramkuvar* v. *Madanlal*, (1977) 79 Bom LR 143.
9. *Dina* v. *Dinshaw*, ILR (1969) Bom 1043 : AIR 1970 Bom 341.
10. *Chaman Lal* v. *Mohinder Devi*, 73 Punj LR 104; *Veeraraghavan* v. *Parvathy*, 1973 Ker LJ 762 : AIR 1974 Ker 43.
11. *N. Varalakshmi* v. *N. V. Hanumantha Rao*, AIR 1978 AP 6.

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18. Ceased to be a Hindu by conversion.—There is no rule of Hindu law which forbids the subsistence of a marriage one of the parties to which has ceased to be a Hindu. The marriage being indissoluble the rule was firmly established that conversion did not operate *per se* as a dissolution of marriage. The Hindu marriage under the Act is one solemnized between persons who are Hindus in the wide connotation of the terms and the Legislature has now laid down that the conversion of one of the spouses to any other religion affords a ground to the other spouse to seek dissolution of the marriage. The Note to the Hindu Marriage and Divorce Bill stated: A change in religion is not inconsistent with the continuance of conjugal love and it should therefore not be permissible for a party to the marriage to get a divorce by changing his or her religion. The right to get a divorce under this law is therefore given to the party who continues to be a Hindu. A somewhat similar right is given to a person changing his religion for Christianity under the Native Convert's Marriage Dissolution Act, 1866, under which a husband or wife who changes his or her religion for Christianity is entitled to sue the other party for restitution of conjugal rights if the other party deserts or repudiates him or her, and if the petition the desertion is persisted in, the court may declare the marriage dissolved after following the prescribed procedure.

The term Hindu in this clause must be understood in the wide sense given to it in Section 2 which includes all Hindus, Buddhists, Jains and Sikhs. So a person continues to be a Hindu even though he may have been converted from any one to any other of these religions and his case will not be covered by this clause. Conversion in the present context implies that the person has voluntarily relinguished his religion and adopted another religion after formal ceremonial conversion. A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith, or is an ardent admirer and advocate of such religion and its practices. But if he abdicates his religion by a clear act of renunciation and adopts the other religion by undergoing formal conversion he would cease to be a Hindu within the meaning of this clause.

In these days of cosmopolitan mixtures and alliances, a matrimonial alliane between persons belonging to different religions does not attract that opprobrium as it once, did, and it is now not unusual to find spouses belonging to different religions living in harmony and affection though pursuing their own religious practices separately. So it is open to two persons who have been married under this Act to live together in spite of the fact that one of them has subsequently become a convert to Mahomedanism or Christianity without getting the marriage dissolved by a decree of divorce.

When Section 2 says that this Act applies to any person who is a Hindu, it also contemplates a person who was a Hindu at the time of marriage but has since ceased to be a Hindu at the time when the petition was presented. The relevant date on which both the parties are required to be Hindus in order for the Act to apply was the date of the marriage.

Change of religion by one of the parties did not automatically dissolve the marriage but provides a ground to the other part for dissolution. Conversion also did not *per se* operate to deprive the party, of rights which may be otherwise available to him under the Hindu Marriage Act.

Religion is a matter of one's conscience and freedom of religion has been guaranteed under the Constitution. A party who has been married under Hindu Marriage Act cannot be debarred from changing his religion. Of course, if he changes his religion, he must be prepared for the consequences thereof i.e.

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a likelihood of a petition under Section 13(1) (ii) of the Hindu Marriage Act. But if no such petition is moved and he is able to establish that he has been treated with cruelty, he surely is entitled to relief, unless there are other reasons for not granting relief.

In the instant case the husband was entitled to move the petition under Section 13(1) (i-a) of the Hindu Marriage Act and cannot be debarred at the threshold. Whether his conversion was *mala fide* and/or a misconduct and/or a contributory factor to the wife's cruelty resulting in him taking advantage of his own wrong or disability are facts to be considered at a later stage and depend on the facts and circumstances of the case that emerge.[1]

19. Incurably of unsound mind. – Section 13 (1) (c) deals with incurable unsoundness of mind which may occur even subsequent to the marriage. The expression "incurably of unsound mind" has been held not to cover the case of feeble-minded persons or persons of dull intellect who can understand the nature and consequences of their acts and control them and their reactions in the normal way.[2] In deciding whether a person is "incurably of unsound mind," the test applied is "whether by reason of his mental condition he is capable of managing himself and his affairs and if not, whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable man".[3] Applying this test in *Gnanambal* v. *Selvaraj*,[4] where the wife was suffering from schizophrenia (not incurable disease by itself),[5] which in spite of treatment over a long period had left her memory without reasonable prospect of restoration to its normal condition and would enable her to live only a half life, the Court held that she was incurably of unsound mind.

It is for the petitioner to establish that the other spouse was of incurably of unsound mind or suffering from mental disorder.[6] If there was a finding by the Court in an Inquisition under the Lunacy Act of such spouse being a lunatic it will be *prima facie* evidence shifting the burden of proof to the persons asserting the contrary.[7] As is sometimes observed, an action for divorce is a kind of a triangular proceeding to which the husband and wife and the State are parties, and the State, therefore, represented by its judicial limb, namely the Court is concerned to see that its arm is long enough and strong enough to meet and smite injustice wherever it lies. Injustices in matrimonial matters are easily perpetrated by the parties and it is all the more necessary for the Courts to be vigilant and see that the sanctity of marital life is not unnecessarily and unduly profaned and polluted by indiscriminate and hasty proceedings in Courts. In a petition for dissolution of marriage on the ground that the respondent is incurably of unsound mind, such unsoundness of mind should be clearly established by the petitioner and there is no right in the petitioner to compel the respondent to undergo medical examination, though it is open to the Court to draw adverse inference when the respondent refuses

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1. *Vilayat Raj* v. *Smt. Sunila*, AIR 1983 Delhi 351 at pp. 354, 355, 356.
2. *Ajit Roi Mehta* v. *Bai Vasumati*, AIR 1969 Guj 48.
3. *Whysall* v. *Whysall*, (1959) 3 All ER 369.
4. (1970) 2 MLJ 429 : 83 LW 494 ; See also *Bani Devi* v. *A. K. Banerjee*, AIR 1972 Delhi 50.
5. See *Dastane* v. *Dastane*, AIR 1970 Bom 312.
6. *Ajit Roi Mehta* v. *Bai Vasumati*, supra.
7. *Seshamma* v. *Padmanabha*, ILR 40 Mad 869.

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to submit to medical examination.[1] The word "or" has been used after expression "has been incurably of unsound mind"—meaning in Section 13 (1) (iii)—The averment in plaint that wife became incurably of unsound mind and that she is also intermittently suffering from mental disorder—plaint is defective as wife cannot become incurably of unsound mind and cannot at the same time intermittently suffer for mental disorder. 'Schizophrenia' is an illness of slow insideous on set developing over years. There may be report of strange, odd inappropriate behaviour. There will be progressive deterioration in the level of performance at work and socially; school report, examination results and the employment record will provide objective and usually reliable indices of intellectual performance, its maintenance or decline. According to clause (iii) of the section, two elements are necessary to get a decree of divorce. The party concern must be of unsound mind or intermittently suffering from Schizophrenia or mental disorder. At the same time that disease must be of such a kind and of such an extent that the other party cannot reasonably be expected to live with her. So only one element of that clause is insufficient to grant a decree. There is no provision under the Act to compel wife for medical examination. Adverse inference cannot be drawn on her non-examination when wife was examined twice and the matter would not have improved by her examination again by doctor. Even non-examination of mother of wife cannot raise any adverse inference. The husband has to prove his own case.[2] In a petition for annulment of marriage on the ground that the wife was insane, no cogent evidence was produced to establish that at the time of marriage wife was of unsound mind or was suffering from some mental disorder. It was held that the petition is liable to the dismissed.[3] If the wife is suffering from incurable form of leprosy, the husband is entitled to a decree for divorce.[4] If the wife is suffering from Schizophrenia intermittently but to such an extent that husband could not reasonably live with her, divorce can be granted. It is not necessary to prove that mental disorder existed at or before marriage.[5]

20. Leprosy.—Section 13 (1) (iv) deals with virulent and incurable form of leprosy as a ground for diverce. Medical testimony can be of considerable assistance and even guidence but ultimately the question is one for the Court and not for the experts and evidence of experts does not relieve the Court from forming its own judgment and from the obligation of satisfying itself beyond reasonable doubt on the question whether leprosy from which the respondent's suffers is both of a virulent form and incurable. The onus of proving this is on the petitioner. The expression 'virulent' was interpreted as malignant or venomous in *Annapornamma* v. *Apparao*.[6] The term virulent is not a medical term and cannot be interpreted by the refering to the meaning given to it under Hindu Law for excluding a person from inheritance.[7] In order, however, to be entitled to a decree of divorce under Section 13 (1) (iv),

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1. *Vipin Chandran* v. *Madhuriben*, AIR 1963 Guj 250; See also *Shanti Devi* v. *Ram Nath*, AIR 1972 P & H 270 : 1972 Cur LJ 315.
2. *Smt. Ritaroy* v. *Siteshchandra Roy*, AIR 1982 Cal 138 (DB) : (1982) 1 Civi LJ 455 (Cal).
3. *Smriti Kana Bag* v. *Dilipkumar Bag*, AIR 1982 Cal 547 (DB).
4. *Swarajyalakshmi* v. *Dr. G. G. Padmarao*, 1973 UJ (SC) 903.
5. *Smt. Kiranbala* v. *Bahire Prasad Srivastava*, AIR 1982 All 242.
6. AIR 1963 AP 312.
7. *Swarajyalakshmi* v. *Padmarao*, AIR 1974 SC 165.

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a party has to prove that his spouse has been suffering from a form of leprosy which is not only virulent but also incurable and further that the spouse concerned has been suffering from this ailment for a period of at least three years before the presentation of the petition. Clearly enough, the conditions under which divorce is to be allowed are far more stringent than the conditions under which judicial separation may be granted.

It was contended that sulphone treatment has been so revolutionary that leprosy should not any longer be considered to be an incurable disease. A study of the vorious authorities on the subject does not support this view. Besides, it is to be remembered that sulphone drugs were discovered in about 1941 and they were very well known all over the world at the time when the Hindu Marriage Act, 1955 was passed. The legislators must be presumed to have known the effect of sulphones on leprosy. If it be true that sulphone drugs have made leprosy of all types curable there would be no point in the Legislature making a provision in the Hindu Marriage Act which will entitle a spouse to a decree of divorce if the other party to the marriage would be found suffering from incurable leprosy. Accordingly it must be held that this is a fit case in which the respondent should be granted a decree of divorce.

The term has to be interpreted as signifying malignant or infectious.[1] Leprosy on account of modern researches and advance in medical science is curable at the initial stage and may become incurable if allowed to be developed unchecked by proper treatment. Again what is regarded as curable at one time may be regarded as incurable at another time.[2]

21. Veneral disease.—Section 13 (1) (b) provides a ground for divorce on the respondent suffering from veneral disease in a communicable form. It is no answer to the petition to say that the petitioner has not been communicated with the disease; nor is it valid defence to take that infact the petitioner had already contracted the desease and it had passed the stage of communicability and therefore the petition does not lie. Since the modern science has discovered penicilin, terramycin, and the like broad spectrum antibiotics, the veneral diseases viz. gonorrhaca, syphilis and the like can be cured immediately and as such, the ground for divorce provides under this sub-clause is rather difficult to prove the fact of venereal disease in a communicable form.

22. Renunciation of the world by entering any religious order.—Under Hindu Law where a person enters into a religious order renouncing all worldly affairs his action is tantamount to civil death. This clause lays down that the husband or wife can seek dissolution of marriage by a decree of divorce on the ground that the respondent has renounced the world by entry any religious order. Both these requirements must be satisfied before a decree for divorce can be granted under this clause the religious orders contemplated by this clause include those of Hindus, Buddhists, Jains and Sikhs. The religious orders wellknown in India require on the part of the person who wants to enter the same the performance certain ceremonies or certain formalities. There are two qualifications in this clause: (1) The renunciation of the world and, (2) Entering a religious order. The mere fact that a person says that he has renounced the world is not sufficient.[3] He must, besides,

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1. See *Annapoorna* v. *Apparao*, AIR 1963 AP 312.
2. *Kayarohana Pathan* v. *Subbaraya Thewan*, ILR 38 Mad 250.
3. *Kondal Rao* v. *Ishwara Sanyasi*, 33 MLJ 63.

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entered the order of sanyasihood by showing a positive act or ceremony. There must be initiation by a *guru* into the order of sanyasis by appropriate *mantra*.[1] Without the performance of the necessary ceremonies, the renunciation will not be complete.[2]

Where the wife had become a Brahma Kumari and declined to maintain matrimonial relations with the husband which amounted to cruelty and deserted him for more than 2 years immediately preceding the presentation of the petition for divorce on the ground of cruelty and desertion, the husband is entitled to the grant of a decree for divorce.[3]

The mere fact that, the mere adoption of the external symbols of sanyasi as the wearing of coloured clothes or shaving of the head is not sufficient to make him sanyasi. The renunciation of the world which is a postulant for sanyasi requires relinquishment of all property and worldly affairs. Relinquishment of property need not be in favour of any particular person but may be in a general way. In the religious law of the people, one who has become a sanyasi in the proper sense of the term is considered as having given up all pleasures and properties whose sole duty is to pray God and wait for the call for departure from this world. Such a person cannot be expected to fulfil the obligations of matrimony chief of which is marital cohabitation, a thing which is forbidden for one who has entered the sanyasi order. It has become of late lucrative profession to don the yellow robe and parade as a Yogi or Yathi to attract public subsriptions, sympathy and veneration at the same time carrying on the duties of a householder. It is not to such persons that this clause is intended to apply. There is no renunciation of the world, but on the other hand a further attachment to the pleasures of life for which person in the yellow robe wants to amass wealth by masquarading in the guise of a sanyasi. There are many such impostors who are really much-married husband's who are drawn to the pleasures of sex-life in ever-increasing decree but who cannot get on in the world except by deceiving it, by covering of the fraud in the saffron robes.

23. Clause (vii) : "has not been heard of as being alive for a period of seven years or more".—This clause is based on the principle, Section 108 of the Evidence Act which raises the presumption of death in respect of a person who has not been heard of for not less than seven years by his relations or his friends or others who have heard of him if he were alive. This is a presumption of universal acceptance as it aids proof of death in cases where it would be extremely difficult if not impossible to prove that fact. It is a presumption of great convenience and Section 8 of the Evidence Act lays down at a distinct rule. Neither in Hindu Law nor in any other civilized jurisprudence is a spouse enjoined to wait eternally for the other spouse who has betaken himself or herself to an unknown destination and has not cared to communicate his whereabouts to the other spouse. The missing spouse may be alive, but the law presumes that he is dead because a person is not likely to be alive if no news has been obtained about him by those who would have naturally heard about him or his whereabouts either for him or for others. The Rules framed under the Act by some of the High Courts require the petitioner to state in any such case, the last place of cohabitation of the parties, the circumstances

1. *Satyanarayana Avadhane* v. *Religious Endowments Board*, AIR 1957 AP 824.
2. *Baldev Prasad* v. *Arya Prity*, AIR 1930 All 643.
3. *Gagan Nath* v. *Krishna Kumari*, 82 Punj LR 83.

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in which the parties ceased to cohabit, the date and place where the respondent was last seen or heard of, and the steps which were taken to trace the respondent.[1]

24. Clause (i) of sub-section (1-A) : No resumption of cohabitation after judicial separation or decree of restitution of conjugal rights.—Section 13 (1-A) was introduced into the parent Act by the Hindu Marriage (Amendment) Act (XIV of 1964). Prior to this amendment under Section 13 (1) (viii) and (ix) of the parent Act a petition for divorce could be filed only by the spouse who had obtained a decree for judicial separation or restitution of conjugal rights. The Marriage Laws (Amendment) Act (LXVIII of 1976) has reduced the period of the two years to one year after such decree.

Thus under Section 13 (1-A) as it now stands, either spouse may apply for divorce on the ground that there has been no resumption of cohabitation between them for a year or more after the passing of a decree for judicial separation or there has been no restitution of conjugal rights for a year or more after the passing of a decree for restitution. The sub-section refers to existing state of affairs and all that is required is that in fact there has been no resumption of cohabitation during the period.[2] The sub-section provides only a ground for applying for divorce. The existence of the circumstances entitling a spouse to relief does not automatically result in a dissolution of the marriage. The party must present a petition for the purpose and a decree on such petition is necessary.[3] As stated above Section 13 (1-A) entitles not merely an aggrieved party but also a defaulting party to obtain dissolution of the marriage. The question is no longer who obtained the decree for restitution of conjugal rights or for judicial separation, or, who was at fault previously or who is at fault now. The question is not one of apportioning blame. The question is have the parties been able to come together after the decree. If they have not been able to come together either party may seek divorce irrespective of whose fault it was that they did not come together. The Court must not grant relief to a party taking advantage of his own wrong.[4] A slightly different view is that the Court has got to reconcile the provisions in Section 13 (1-A) and Section 23 (1), that the Court is under a duty to see under Section 23 (1) whether the petitioner under Section 13 (1-A) is disabled by his conduct *subsequent to the decree* which may again amount to taking advantage of his own wrong.[5] Yet another view is that the concept of wrong-disability which was hitherto the sole basis of relief under the Act has now in part given way to the concept of a broken-down marriage irrespective of wrong or disability, and that it is not permissible to apply the provisions of Section 23 (1) based as they are on the concept of wrong-disability to proceedings in which relief is claimed under Section 13 (1-A) or Section 13-B based

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1. *Parkinson* v. *Parkinson*, (1939) 3 All ER 108 ; *Narki* v. *Lal Sahu*, ILR (1909) 37 Cal 103.
2. *Madhukar* v. *Saral*, (1972) 24 Bom LR 496 : AIR 1973 Bom 55.
3. *Narasimha Reddy* v. *Boosamma*, AIR 1976 AP 77 at 78.
4. *Laxmibai* v. *Laxmichand*, AIR 1968 Bom 332 ; *Chamanlal* v. *Mohinder Devi*, AIR 1968 Punj 287 ; *Syal* v. *Syal*, AIR 1968 Punj 489 ; *Someswara* v. *Leelavati*, AIR 1968 Mys 274 ; *Jethabhai* v. *Manabhai*, AIR 1975 Bom 88.
5. *Anil* v. *Sudhaben*, AIR 1978 Guj 74 ; *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167 (FB) ; *Gozina Devi* v. *Purshotham Giri*, AIR 1977 Delhi 176.

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as they are on the concept of a broken-down marriage.[1] At any rate the wrong or disability contemplated by Section 23 (1) (a) is not the non-resumption of cohabitation or the non-restitution of conjugal rights which is the basis of Section 13 (1-A).[2] It is not possible to spell out under Section 13 (1-A) any obligation against the petitioner to give any assurance to the respondent; all that was required was non-resumption of cohabitation for the requisite period after the passing of a decree for judicial separation.[3]

To deprive a defaulting party to a decree of restitution of conjugal rights of the benefit under Section 13 (1-A), his subsequent conduct must not be only mere non-compliance but must amount to a positive misconduct of such repulsive or shocking nature as would amount to his taking advantage of his own wrong.[4]

Where in a suit by the husband for restitution of conjugal rights the wife's claim for judicial separation was decreed and had become final and later on the husband filed an application for divorce under Section 13 (1-A), it could not be resisted on the ground that the earlier decree for judicial separation was passed without jurisdiction.[5]

The effect of the amended sub-section (1-A) of Section 13 of the Hindu Marriage Act is that it entitled even a defaulting party and not merely an aggrieved party to obtain a dissolution of a marriage by decree of divorce on satisfaction of the conditions prescribed therein. It also cannot be a bone of contention between the parties that either of the spouses is under any obligation to resume cohabitation after the decree for judicial separation or restitution of conjugal rights is granted.[6]

Where there were specific allegations in the statement of objections filed by the wife as to how the husband could not take advantnge of his own misconduct and obtain a decree for divorce. The husband failed to maintain the wife; that he was trying to remarry and that he was coercing the wife to withdraw the proceedings brought legitimately by her and to agree for a decree for divorce. That, according to the wife, the conduct of her husband constituted misconduct on his part which disentitles him for a decree for divorce.

Reading Section 13 (1) (A) and Section 23 (1) (a) it becomes obvious that the court shall also consider while passing a decree for divorce whether the party seeking for divorce was in any way taking advantage of his or her own wrong or disability for the purpose of such relief. It must make an attempt at reconciliation and then proceed to consider the case for granting divorce if attempt at reconciliation fails.

In order to be a "wrong" within the meaning of Section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or wife was otherwise entitled.

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1. Per *Chinnappa Reddy, J.* in *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167 at p. 177.
2. *Ibid* at p. 178.
3. *Madhukar* v. *Saral*, AIR 1973 Bom 55.
4. *Anil* v. *Sudhaben*, AIR 1978 Guj 74.
5. *Lad Kumwar* v. *Jagdish*, AIR 1979 Raj 197.
6. *Bai Mani* v. *Jayantilal Dahyabhai*, AIR 1979 Guj 209.

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The wife-respondent has averred in her objection statement that there was misconduct on the part of husband serious enough to justify the denial of the relief of divorce. The trial Court has neither raised a point in that behalf nor has it discussed the evidence adduced concerning that aspect. Hence, the decree of the trial Court was vitiated and it cannot be sustained.[1]

Where a decree for restitution of conjugal rights was obtained by the appellant-wife under Section 9 on the ground that the husband had without reasonable cause withdrawn from her society. A decree for restitution of conjugal rights was granted to the wife. After the decree, the husband not only, not complied with the decree, but did positive acts by ill-treating her and finally drove her away from the house. It was not a case of mere non-compliance of the decree, but fresh positive acts of wrong. Therefore, the respondent-husband was not entitled to the relief under Section 13 (1A) of the Hindu Marriage Act.[2]

If a consent decree for restitution of conjugal rights under Section 9 was passed, it would not be a nullity. If it was not challenged in appeal or by way of other remedy available under the law and becomes final, it cannot be ignored and can form the basis of divorce proceedings under Section 13.[3]

The fact that the decree-holder has not taken any steps to execute the decree or has not made even a demand for its compliance will not defeat his right to ask for divorce under this section since the compliance required is a compliance by the judgment debtor.[4]

Failure of the husband to execute the decree which he has obtained for restitution of conjugal rights does not amount to non-compliance of the decree so as to entitle the wife to seek for restitution of conjugal rights.[5]

In *Someswara* v. *Leelavati*,[6] it was held that where the wife returned to the husband after a decree for restitution of conjugal rights and lived in his house for sometime with the genuine intention of continuing to live there but had to leave the husband on account of his hostile attitude to her, the decree for restitution could not be regarded as not having been complied with within the meaning of Section 13 (1-A).

Resumption of cohabitation within the meaning of Section 13 (1-A) is resumption by volition of both parties or by reconciliation and not by way of a unilateral attempt by one of the spouses against the will of the other to resume cohabitation.[7] Where the petitioner-husband was not guilty of creating obstruc-

1. *Smt. K. S. Lalithamma* v. *N. S. Hiriyannaiah*, AIR 1983 Kant 63 at pp. 64, 65 and 67.
2. *Geeta Lakshmi* v. *G. V. R. K. Sarveswara Rao*, AIR 1983 AP 111 at p. 114 : (1982) 2 APLJ 405 : 1982 LS (AP) 239 ; (1983) 1 Andh LT 118 (HC).
3. *Sudarshan Kumar Chadha* v. *Smt. Saroj Rani*, AIR 1983 Punj 59 at p. 61.
4. *Bulag Kaur* v. *Gurdev Singh*, ILR (1963) 2 Punj 213 : AIR 1963 Punj 493 ; *Suryakaantam* v. *Ranga Rao*, (1973) 1 An WR 158 : (1972) 2 APLJ 26.
5. *Kamleshkumari* v. *Kartar Chand*, AIR 1962 Punj 156.
6. AIR 1958 Mys 274.
7. *Varalakshmi* v. *Hanumantha Rao*, (1978) 1 An WR 72 : AIR 1978 AP 6.

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tion and on the other hand was found willing to take back the respondent and resume marital relations divorce cannot be refused to him.[1] Approving the statement of the law by the Delhi High Court in *Kam Kali* v. *Gopal Dass*,[2] holding that mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23 (1) (a), the Supreme Court has in *Dharmendra Kumar* v. *Usha Kumari*,[3] pointed out that the grounds for granting relief under Section 13 including sub-section (1-A) however continue to be subject to the provisions of Section 23, and that in order to be a wrong within the meaning of Section 23 (1) (a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct *serious enough* to justify denial of the relief to which the husband or the wife is otherwise entitled.

Cohabitation signifies the husband acting as a husband towards his wife and the wife acting as a wife towards her husband and he is cherishing and supporting her. Sexual intercourse will be conclusive evidence of cohabitation; absence of it will not negative cohabitation.[4]

The period of one year is to be reckoned from the date of the decree of the Court of first instance; likewise when an appeal was taken and the decree was confirmed. Where the first Court had dismissed the petition and on appeal a decree for judicial separation was granted, the period has to be reckoned from the date of the appellate decree. The appellate Court cannot ante-date the decree.[5] A decree for dissolution of marriage passed in a suit filed on the ground that the other spouse failed to obey the decree for restitution of conjugal rights cannot be said to be illegal only because the Court did not make any endeavour to bring about a reconciliation between the parties. The period of one year prescribed for filing a suit for dissolution of marriage should be deemed to commence from the date of decree and not from the date of knowledge of the decree.[6] When the wife obtained the decree for restitution of conjugal rights and the husband remaining silent and not showing any inclination to obey decree would not entitle the husband for decree for divorce. The entire obligation rested with husband is to make all efforts to obey the decree for restitution of conjugal rights, even if wife applied for maintenance after 55 days and it would not mean that wife is unwilling to join the husband.[7] The husband obtaining a decree for restitution of conjugal rights against wife and wife ready and willing to comply with the decree. The total reluctance of husband to resume cohabitation and husband filing application for divorce after prescribed period under this section is over. Wherein reluctance of husband is not a 'wrong'

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1. *Rameshwari* v. *Kirpashankar*, AIR 1975 Raj 28.
2. ILR (1971) 1 Delhi 6 (FB) and *Gajna Devi* v. *Purshotam*, ILR (1976) 1 Delhi 725 : AIR 1977 Delhi 178 (FB).
3. AIR 1977 SC 2218.
4. See *Evans* v. *Evans*, (1974) 2 All ER 656; *Thomas* v. *Thomas*, (1948) 2 All ER 98.
5. *Kirpalani* v. *Kirpalani*, AIR 1960 Bom 447.
6. *Smt. Leelawati* v. *Ramsevak*, AIR 1979 All 285.
7. *Shantabai Prabhakar Kothale* v. *Prabhakar Atmaram Kothale*, 1977 Mh LJ 453.

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within the section which would disentitle him from getting divorce decree.[1] The relief of dissolution of marriage by decree of divorce specified either of clauses (i),(ii) of sub-section (1-A) of Section 13 cannot be obtained in the same proceedings in which the decree for judicial separation or restitution of conjugal rights has been passed.[2] The recording of satisfaction of decree on basis of statement of parties in Court that they were willing to live together does not tantamount to restitution of conjugal rights. There must be resumption of conjugal duties infact.[3]

Where the husband did not resume cohabitation for a period of one year or more after passing of the decree of restitution of conjugal rights and the husband filed an application for divorce, the executing Court could validly refuse to executive the decree for restitution of conjugal rights and refuse to record satisfaction thereof. On analysis of the provisions of Sections 13 (1-A) and 23 of the Act and Order 21, Rule 23 of C. P. C. providing for execution of decree for restitution of conjugal rights it follows firstly, that under Section 13 (1-A) of the Act either of the parties including a defaulting party can seek divorce on the ground that there has been no restitution of conjugal rights for a period of one year or more after passing of the decree, secondly, that the question as to who is at fault for not coming together is not to be gone into by the Courts, thirdly, that words 'wrong' or 'disability' referred to in Section 23 (1) (a) when read with Section 13 (1-A) mean a wrong or disability other than a mere disinclination to agree to an offer to reunion in pursuance of a decree for re-titution of conjugal rights, fourthly, that a decree for restitution of conjugal rights can be executed symbolically under Order 21, Rule 32 of C. P. C. and fifthly, that simply because a spouse refuses to resume cohabitation inspite of an execution application filed by the other spouse it cannot be said that decree for restitution of conjugal rights stands satisfied : and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.[4] The wife obtained judicial separation proving that the husband was living with the another woman. After a lapse of two years the husband sought a decree for divorce under Section 13 (1-A) further averring that they had not resumed cohabitation during the period, was held to be untenable in view of his wrong.[5] A decree for restitution of conjugal rights was appealed and cross objections were also filed but both were dismissed for want of prosecution. It was held that such dismissal amounted to recognition of existing decree of Trial Court and period of one year in Section 13 (1-A) (iii) had to be reckoned from date of such a decree, C. P. C. Order 23, Rule 1 read with Section 2 (2). The order of appellate Court suspending execution of decree of Trial Court for restitution of conjugal rights for period of one month from date of withdrawal of appeal and cross objection does not operate as a bar to filing of petition under Section 13 (1-A) (ii) within that period.[6] The petition for divorce by husband on the ground of desertion on his wife when husband was wholly guilty of maltreatment no

1. *Smt. Gurmeet Kaur* v. *Harbans Singh*, AIR 1981 P & H 161.
2. *Sadan Singh* v. *Resham*, AIR 1982 All 52.
3. *Smt. Harbhagan Kaur* v. *Lt. Col. Bhagwant Singh*, AIR 1982 P & H 200.
4. *Santoshkumari* v. *Mohan Lal*, AIR 1980 P & H 325.
5. *Soundaramma*i v. *Sundra Nadar*, AIR 1980 Mad 294.
6. *Motilal Madhavlal Chauhan* v. *Padma Ben*, AIR 1982 Guj 254.

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matrimonial misconduct is attributable even remotely to the wife, then Section 13-A is not attracted.[1]

A party against whom a decree for restitution of conjugal rights or judicial separation has been passed is entitled to divorce under Section 13 (1-A). The wrong referred to in Section 23 (1) (a) has no application merely because party against whom earlier decree was passed applies for divorce. A wrong prior to the passing of the decree is not wrong contemplated under Section 23 at all and the past conduct cannot be used as a valid defence against the petitioner seeking divorce under Section 13 (1-A) of the Act.[2] A decree for divorce cannot be denied on the ground that the petitioner has failed to remedy the wrong such as cruelty which laid to the decree for judicial separation.[3] In a divorce proceeding when the wife has obtained a decree for judicial separation on the ground of desertion, the desertion terminates and there can be no continuation of that matrimonial wrong of desertion after the passing of decree. In granting relief under Section 13 (1-A) the Court must take into consideration Section 23 (1).[4] Petition under Section 13 for dissolution of marriage resulting in consent decree for judicial separation without proving any of the grounds mentioned in Section 10, the decree is held in violation of mandatory provision of Section 23 (1) and therefore without jurisdiction, and divorce could not be granted later on, on the ground of non-resumption of cohabitation.[5] If there is no restitution of conjugal rights for a prescribed period after the decree, the section does not further require such spouse to execute the decree or do any positive act, of inviting the other spouse to live together.[6] If after passing a decree for restitution of conjugal rights the husband stands by and does not make any effort to bring his wife back, he cannot as a matter of course, get a decree for divorce simply on the ground that the period of two years had elapsed and that during that period the wife did not live with him.[7]

Where the husband did not make any attempt to bring his wife back and had also spurned his father-in-law's requests for taking wife back. In the circumstances, husband without any reasonable excuse having withdrawn from the society of his wife, she was entitled to a decree for restitution of conjugal rights.[8]

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25. Clause (i) of Section 13 (2)—Husband remarrying.—This clause provides for a ground for decree of divorce to the wife only. The first ground is with reference to second marriage of the husband and provides that in the

1. *Angrez Kaur* v. *Baldeo Singh*, AIR 1980 P & H 171 reversed, in *Angrez Kaur* v. *Baldeo Singh*, AIR 1982 P & H 339 (DB).
2. *Vatsala* v. *Niranjan*, 1981 Mh LJ 917.
3. *Madhukar Bhaskar Sheorey* v. *Smt. Saral Madhukar Sheoray*, AIR 1973 Bom 55 : 74 Bom LR 496 : 1972 Mh LJ 762.
4. *Jethabai Ratanshi Lodaya* v. *Manabai Jethabai Lodaya*, AIR 1975 Bom 88 (DB) : 76 Bom LR 304.
5. *Hira Kali* v. *Avsasthi*, AIR 1971 All 201.
6. (1972) 2 APLJ 261.
7. 79 Cal WN 48 (DB).
8. *Smt. Sandhya Bhattacharjee* v. *Gopinath Bhattacharjee*, AIR 1983 Cal 161 at p. 165 : (1982) 1 Cal LJ 318 : (1982) 86 Cal WN 665 : (1982) 2 DMC 59 : 1982 Hindu LR 430 : 1982 Mat LR 237 (HC),

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case of any marriage solemnised before the commencement of this Act if the husband married again before such commencement, and the wife of the first marriage is also alive, then the wife married on the second marriage is entitled to present a petition for divorce. Similarly if prior to the commencement to the Act the husband had married again. The wife of first marriage is entitled to present a petition for divorce on the ground of his second marriage, the wife of that marriage being alive at the time of the presentation of the petition. The policy of this Act is in favour of monogamy, and since it cannot pronounce as invalid the polygamous marriages that had taken place prior to the Act which were valid at the time of the particular community which was governed by system of polygamous marriage, the Act enables the wife of any such marriage to free herself from the husband who has another wife living at the time of the petition. It may even happen that both of them may ask for divorce resulting, if divorce is granted, in the unenviable position of the husband being the pride of both the wife.[1] In such a case, it is open to the husband to contract a monogamous marriage under this Act. Where a petition has been filed on the ground of his husband marrying a second wife, the fact that subsequent to the petition he has divorced the second wife is no ground for dismissing petition.[2] The fact that the wife who being married prior to the Act had inspite of the husband's second marriage which had taken place prior to the Act had come to some compromise and lived with the husband for some time would take away her right to present petition for divorce.[3] It is not open to the husband to plead any conduct or disability on the part of the petitioner wife as a bar to her to claim for divorce on the ground of the second marriage.[4] A second wife entitled to relief under Section 13 (2) (i) would, by reason of Section 23 (1) (d) become disentitled to such relief by unnecessary or improper delay in instituting the proceedings.[5] A petition for injunction restraining husband from taking a second wife is not maintainable.[6]

26. Rape, sodomy or bestiality.—Section 13 (2) (ii) provides that where after solemnization of the marriage the husband is guilty of rape, sodomy or bestiality, that would be a ground for divorce. Bestiality is a crime of a man with animals and beasts, which is punishable offence under Section 337 of Indian Penal Code. A man is said to commit rape who has sexual intercourse with a woman against her will, or without her consent or with her consent obtained by putting her in fear of death or with the consent under mistaken belief that she is his wife when infact she is not wife or without her consent when she is under twelve years of age except when she is his wife. The misconduct of the husband had taken place after the marriage, even though nobody else knew about it and the husband has not been brought to book in the Courts of the country for such offence. Sodomy or bestiality is committed by a man who has carnal intercourse against the order of nature with any man, woman or animal, it is carnal copulation *per annum*, and even when the

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1. *Smt. Venkatamma* v. *Venkataswami*, AIR 1963 Mys 118 ; *Smt. Leela* v. *Dr. Rao Ananth Singh*, AIR 1963 Raj 178.
2. *Mandal Naganna* v. *Lachmi Bai*, AIR 1963 AP 82.
3. *Smt. Nirmoo* v. *Nikkaram*, AIR 1968 Delhi 260.
4. *Lalitamma* v. *Kannan*, AIR 1966 Mys 178.
5. *Alagerswami Chettiar* v. *Lakshmi Ammal*, (1972) 1 MLJ 187.
6. *Umashankar Prasad Singh* v. *Smt. Radha Devi and others*, AIR 1967 Pat 220.

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husband commits sodomy with his own wife, she is not being a consenting party, a petition for divorce against the wife is maintainable.[1]

27. Non-cohabitation after decree for maintenance.—A decree or order awarding maintenance to the wife under the Hindu Adoptions and Maintenance Act, 1956, or Section 125, Criminal Procedure Code, 1973, is treated on the same footing as an order or decree for judicial separation as an additional ground to the wife for divorce. Under Section 13 (2) (iii) the wife can claim dissolution of her marriage on the ground that subsequent to the passing of the maintenance decree or order, the spouses had not resumed cohabitation for a year or more.

28. Repudiation of marriage by wife married before attaining 15 years.—Though a marriage in violation of the age limit set in Section 5 (iii) is not rendered invalid a wife with whom marriage was solemnised before she had attained 15 years is given a right under Section 13 (2)(iv) to have her marriage dissolved. The right has to be exercised by the wife after attaining the age of 15 years but before completing 18 years.

29. Practice, procedure, jurisdiction and duty of Court.—When an application for judicial separation was dismissed for default and was not restored, a subsequent application for divorce on the same ground is barred.[2] A fresh petition for divorce is maintainable by the husband on the ground of desertion after his petition for restitution of conjugal rights had been dismissed.[3] The principle of *res judicata* cannot be applied to cases where the ground taken is different.[4] Merely because the Trial Court which passed the decree described itself Small Cause Court, the order passed in the exercise of the special jurisdiction will not be ineffective and without jurisdiction.[5] No evidence need be given by a party against an admission incorporated in the pleadings.[6] A petition filed under Section 13 for dissolution which ended in judicial separation by consent of the parties without providing any ground for the relief would be invalid.[7] It is to be noticed that an unnatural offence committed by the wife is not made a ground of divorce at the instance of the husband. Petition under Section 13 for dissolution of marriage resulting in consent decree for judicial separation without proving any of the ground mentioned in Section 10 is in violation of mandatory provision of Section 23 (1) and therefore without jurisdiction. Divorce could not be granted latter on, on the ground that there was no resumption of cohabitation for the reason that consent of the parties did not confer jurisdiction on the Court to pass a decree. On the contrary, it amounted to collusion which the legislature wanted to prevent.[8] In matrimonial cases it is the duty of the Court to apply some standard of proof in arriving at all his findings.[9] The question whether spouse had committed adultery is a question of fact and when there is concurrent finding on it, the High Court has no

1. See 22 TLR 26.
2. *Manjit Kaur* v. *Gurudial Singh*, AIR 1978 P & H 150.
3. *Surendar Kaur* v. *Kirpal Singh*, (1978) 80 Punj LR 695.
4. *Prakashchand* v. *Kanta Gupta*, AIR 1979 Delhi 33.
5. *Nirmal* v. *Premavati*, AIR 1972 All 494.
6. *Shakuntala* v. *Sardari Lal*, AIR 1972 P & H 29.
7. *Hirakali* v. *Avasthi*, AIR 1971 All 201.
8. *Hirakali* v. *Awasthi*, AIR 1971 All 201 (DB).
9. *Dr. H. T. Vira Reddi* v. *Kistama*, AIR 1969 Mad 295.

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jurisdiction in second appeal to reassess evidence and come to different conclusion.[1] The *ex parte* decree passed in a petition filed by the wife under Sections 10 and 13, was set aside in appeal by the husband and the case was remanded. Wherein the husband contested the petition on merits before the Trial Court raising objection as to territorial jurisdiction. Failure to raise such objection in appeal, the husband neither waived such objection nor submitted to jurisdiction of Court.[2] When the petition under Section 13 was presented within three years after marriage which did not clearly mention as to whether it is under Section 10 or 13, the amendment of petition can be allowed.[3] There are three circumstances under which delay may occur in cases of institution of suits for dissolution of marriages or judicial separation thereof. If the delay is intentional amounting to acquiescence, relief should be refused. Secondly, the delay may be due to optimism of amicable settlement, in which case delay may be excused. Lastly, it may be due to an apathy on the part of the woman either due to ignorance of legal consequences or due to poverty. The Court should analyse the predominant reason or explanation for delay on humanitarian principle. Even if the delay is not explained, the Court should weigh the consequences of dismissal both to the parties and children, if any, against the possible injustice of permitting a party to reverse a position in which it might have acquiesced.[4]

In a petition for divorce lesser relief of judicial separation can be asked for at appellate stage.[5] In a husband's petition for restitution of conjugal rights, imputation of unchastity against wife not amounting to cruelty cannot be created in defence under Section 13.[6] A decree for restitution of conjugal rights in favour of husband and the husband did not take steps to give effect to it for more than two years, the wife is entitled to ask for divorce and decree for restitution for conjugal rights becomes ineffective when she does so.[7] A suit for restitution of conjugal rights was decreed and appeal was filed by the wife to High Court and pending the appeal a suit for divorce was filed by the husband and it was decreed and divorce was granted. Copy of the judgment and decree was filed by the husband in High Court as additional evidence. The decree for restitution of conjugal rights held became infructuous and therefore appeal also became infructuous.[8] Where the divorce petition is presented under Section 13 (2) (i), the petitioner cannot be non-suited on the plea of estoppel on the ground that the petitioner, at the time of her marriage, knew about her hubsand's previous marriage. A statutory right is given to a wife to present an application for divorce and the only limitation under Section 13 (ii), put on her right is that the other wife should be alive at the time of presentation of the petition. The only ground on which relief can be refused to a petitioner under the Act is on any of the grounds enumerated in Section 23.[9] A petition by husband for dissolution of marriage was dismissed by Lower Court for non-compliance of its order under Section 24 of the Act for payment of maintenance

1. *Subbarama Reddiar* v. *Saraswathi Ammal*, AIR 1967 Mad 85.
2. AIR 1970 J & K 19.
3. *Sawita Devi* v. *Prem Nath*, AIR 1967 J & K 89.
4. 1966 MPLJ 793 : 1966 Jab LJ 690 ; 1970 MPWR 298.
5. *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235 (DB).
6. *K, V. Revanna* v. *Suseelamma*, AIR 1967 Mys 165.
7. *Shanti Devi* v. *Ramesh Chandra Roukar and others*, AIR 1969 Pat 27.
8. *Smt. Sudarsan* v. *Shree Prem Kumar Saran*, AIR 1967 Pat 4.
9. 1969 Cur LJ 232 : 71 PunjLR 730.

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pendente lite and litigation expenses to the wife. It was held that dismissal is illegal.[1] A decree for divorce granted by District Court when found erroneous on appeal, can be substituted into one for the judicial separation by applying maxim *'Actus curiae neminem gravabit'*. As such a decree will be operative from the date of judgment of District Court and as two years have passed from that date the High Court in letters patent appeal could pass a decree for divorce under Section 13 (1-A).[2] Where the second wife under a bigamous marriage performed six years before the Act, choose to live in the husband's home along with the first wife amicably, begot children and even continued to live with him for seven years after the commencement of the Act, fully knowing her right under the Act, a petition under Section 13 (2) (i) filed on the mere ground that she has fallen out with the husband will be dismissed under Section 23 (1) (d) on ground of unnecessary or improper delay.[3]

Thus where a wife lived happily from 1948 till 1961 and when ill-feeling developed due to a reasonable doubt about the loyalty of the wife, the consequent hostile conduct of the husband cannot justify inordinate delay (not explained on any of the grounds mentioned in AIR 1963 Raj. 178) till the year 1961 when she brought the petition in pursuance of the choice conferred on her by the Act.[4]

Inordinate delay in applying for divorce under Section 13, can be refused, even though the plea of delay is not raised in the written statement.[5]

Consent decree for dissolution of marriage on grounds other than those mentioned in Sections 10 and 13 of the Act. Section 96 (3), C. P. C. does not apply. Second appeal is competent.[6]

The finding on the question of adultery in maintenance proceedings by the wife does not operate as *res judicata* in the divorce proceedings by the husband.[7]

Application for divorce withdrawn with liberty to file fresh petition. Fresh application is not barred.[8]

Application by husband for divorce was compromised. Wife thereafter going and living with husband for sometime. Decree is satisfied. Fresh application for divorce does not lie on same grounds.[9] In the case of adultery by the wife, the plea of non-access has to be taken in pleadings and a specific issue raised to that effect : without this being done, mere admissions made by the wife in cross-examination cannot be relied on for proof of adultery.[10]

Res judicata.—Where the divorce petition was filed by husband and the wife filed petition for custody of minor child. Whereupon petition of wife was

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1. 1975 Andh LT 321 (DB).
2. AIR 1971 Delhi 208.
3. *Lakshmi Ammal* v. *Alagiriswami Chettiar*, AIR 1975 Mad 211 ; (1972) 1 Mad. LJ 187, affirmed.
4. (1972) 1 Mad LJ 187 ; 85 Mad LW 913.
5. *Jasmel Singh* v. *Smt. Gurnam Kaur*, AIR 1975 Punj 225 (228).
6. *Smt. Kamla Devi* v. *Rajendra Pal Singh*, AIR 1972 All 338.
7. (1971) 1 APLJ 230.
8. *Jasmel Singh* v. *Smt. Gurnam Kaur*, AIR 1975 Punj 225.
9. *Ibid.*
10. *Smt. Anandi Devi* v. *Raja Ram*, AIR 1973 Raj 94.

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dismissed and the appellant continued to have the custody of the child. Later both the parties agreed to a divorce by consent, but contested the matter on question of custody of the child. Additional Judge directed the custody of the child to be with the mother. It was contended by the appellant that once an order under Section 10, Hindu Minority and Guardianship Act read with Sections 7 and 11, Guardian and Wards Act was made, that order operates as *res judicata*. It was held that the order of the Judge did not operate as *res judicata* so as to bar the court from exercising jurisdiction under Section 13 read with Section 26 of the Hindu Marriage Act, for making a suitable order as to the custody of the child. Therefore, the Additional Judge was right in ordering the custody of the child to be with the mother.[1]

30. Evidence and burden of proof.—The petitioner must establish conversely, that the respondent has been incurably of unsound mind and secondly, that she has been so for continuous period of not less than three years immediately before the filing of the peti ion.[2] The procedure in divorce is a civil proceeding, not a criminal proceeding, and the analogies and precedents of Criminal Law have no application in the divorce Court, a civil Tribunal. Section 3 of Evidence Act, defining 'proved' makes no distinction between the proof in a civil case and proof in a criminal case. In the law laid down by the Supreme Court, however, what one finds is consensus, in the sense of unanimity that the standard of proof is a matrimonial cause in India is proof beyond reasonable doubt. That there were opportunities for committing adultery is nothing : there must be circumstances amounting to proof that opportunities could be used, such as, the association of the parties was so intimated and there mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence. The falsity of a particular defence on the part of the wife can never be a substitute for proof of the charge of adultery brought against her which it is for the petitioner husband to prove. Evidence on post suit adultery is admissible, not as the basis for a decree for divorce, not as a ground on which divorce can be granted, but to prove and explain the other evidence given in the case, to tend to show the character and quality of the previous acts. The mere fact that the wife was suffering from acute uterine haemorrage during the divorce proceedings some three years after she had left the petitioner husband, proves neither pregnancy nor abortion and nor adultery either.[3] Adultery, from its nature, is a secret act. Direct evidence of an act of adultery is extremely difficult. It is very rarely indeed that the parties are surprised in the direct act of adultery. Direct evidence, even when produced, the Court will tend to look upon it with disfavour, as it is highly improbable that any person can be a witness to such acts, as such acts are generally performed with almost secrecy.[4] Falsity of party's case does not mean that the case of opposite party is true.[5] Though an isolated act of adultery may provide a ground for judicial separation, it will not be sufficient for obtaining dissolution of marriage.[6] Where the allegations in respect of the plea of

1. *Ravur Venkata Subbaiah* v. *Smt. Merugu Kamalamma*, 1982 (2) Civi LJ 76 at pp. 78-81 (AP) : AIR 1982 AP 269.
2. 71 Bom LR 569 ; 1969 MHLJ 798 : AIR 1970 Bom 312.
3. *Sachindra Nath Chatterji* v. *Smt. Nilima Chatterjee*, AIR 1970 Cal 38.
4. *Pattayee Ammal* v. *Manikkam Gounder and another*, AIR 1967 Mad 254 : 79 Mad LW 393 ; *Dr. H. T. Vira Reddi* v. *Kistamma*, (1969) 82 Mad LW 18 : AIR 1969 Mad 235.
5. *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235.
6. *Lallan Misir* v. *Smt. Lalita Kunwar*, 1970 All LJ 1175.

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adultery are that the wife was moving freely with the clerk giving him milk, food etc. sitting near the radio in the company of the clerk and laughing and cutting jokes with each other, and attending cinemas. Held, that the allegations were not sufficient to establish the plea of adultery.[1] Further it has been held that the mere intention to commit adultery is not offence under the Act and therefore the intention itself is not proof of adultery. There being a presumption of innocence, burden to prove adultery is on person alleging. That the wife was habituated to sexual intercourse cannot be inferred from circumstances based on medical evidence and on the fact that marriage lasted only one day. The principle that wife had strong inclination as well as opportunity for sexual intercourse with strangers cannot be applied to such a case.[2] In a case of adultery direct proof is difficult to get and one has to rely on circumstantial evidence as to non-access, birth of a child and confessions and admissions of the parties in relation thereto.[3] The best evidence of condonation of adulterous conduct is the continuance or resumption of sexual relation by the parties after one has discovered the misconduct of the other party. Question of condonation is one of fact.[4] Ordinarily evidence of adultery should be independent of wife's admission particularly when such evidence of admission is open to exception and cannot be believed in the light of surrounding circumstances. The single act of adultery by itself would not amount to 'is living in adultery'. A continuous course of adulterous life till the filing of the petition must be proved beyond reasonable doubt.[5] If a husband proves beyond reasonable doubt that his wife has been seen absenting herself from his house for a long time and has been seen in the company of a total stranger to his family and that no reasonable explanation is given by her or that she has given false explanation for her having been seen in the company of that stranger at different places, or in a room it will give rise to a reasonable inference that she has contracted illicit connection with that man and has been living in adultery. The standard of proof required in such a case is similar to the one in a criminal case. The evidence must be independent, disinterested, cogent, reliable and worthy of credit.[6] In a petition for divorce, prior decree for judicial separation is not necessary.[7] One or two isolated acts of adultery are not sufficient to grant decree of divorce but is a ground for granting judicial separation.[8]

There is no provision under the Hindu Marriage Act or the rules framed thereunder or in the C.P.C. or Evidence Act or any other law which would show any power in the Court to compel any party to undergo medical examination. Where a party refuses to submit to a medical examination in a case where the whole case depends on the state of his mind and body, it will be open to the Court to draw an adverse inference or presumption against the recalcitrant party.[9] No evidence could be given by party against an admission incor-

1. (1971) 1 APLJ 230.
2. AIR 1971 Delhi 208.
3. AIR 1971 Guj 33.
4. AIR 1971 Guj 36.
5. *Narayanan Ezhuthassan* v. *M. Parukutty*, AIR 1973 Ker 171.
6. *Thimmappa Dasappa* v. *Thimmavva Kom Thimmappa*, AIR 1972 Mys 234 (DB).
7. *Anupama Misra* v. *Bhagaban Misra*, AIR 1972 Orissa 163.
8. 1975 Hindu LR 29 (Punj).
9. *Shanti Devi* v. *Ram Nath*, AIR 1972 Punj 270.

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porated in the pleading of that party.[1] In case of adultery proof beyond the reasonal doubt means such proof as it preclude every reasonable hypothesis except that which it tends to suffer. It need not reach certainty, but must carry high degree of probability. The Court would not as a general rule infer adultery from evidence of opportunity alone, but would require some satisfactory proof.[2]

31. **Court Fees.**—A petition in a suit under the Native Converts' Marriage Dissolution Act, 1866 requires Court Fee Stamp of Rs. 37.50. Every petition under Indian Divorce Act, 1869 except petitions under Section 44 of that Act and every memorandum of appeal under Section 55 of that Act requires Court Fee Stamp of Rs. 37.50. The plaint, application, petition, or memorandum of appeal under the Parsi Marriage and Divorce Act, 1936, the Special Marriage Act, 1954, or the Hindu Marriage Act, 1955, requires Court Fee Stamp of Rs. 37.50, provided that where in addition to divorce damages are claimed a fee as above plus a fee on the amount of damages claimed according to the scale prescribed under Article 1 of Schedule I, of Bombay Court Fees Act 1959. According to the Schedule II of Bombay Court Fees Act 1959, a plaint, petition, application, (including memorandum of appeal) which is capable of being treated as a suit for annulment of marriage, dissolution of marriage, restitution of conjugal rights, judicial separation requires Court Fee Stamp of Rs. 37.50, and for a suit for custody of minor a Court Fee Stamp of Rs. 18.75 is required. Similar relief prayed for in or to any civil Court not otherwise provided for and the subject-matter of which is not capable of being estimated in money value *ad valorem* fee payable, as if the amount or value of the subject-matter was Rs. 300 (Rs. 30).

[3][**13-A. Alternate relief in divorce proceedings.**—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (*ii*), (*vi*) and (*vii*) of sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.]

Comments

In cases where divorce is sought on the grounds of the respondent having ceased to be a Hindu by conversion or having renounced the world by entering a religious order or of his not being heard of for seven years or more the Court is not vested with any discretionary power. In other cases it can grant judicial separation.

A petition for divorce by husband on the ground of desertion when husband was fully guilty of mal-treatment no matrimonial misconduct is attributable even remotely to the wife and Section 13-A is not attracted.[4]

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1. *Smt. Shakuntla Tandan* v. *Sardari Lal Tandan*, AIR 1972 Punj 29.
2. *Smt. Pushpa Devi* v. *Radheshyam*, AIR 1972 Raj 260.
3. Section 13-A inserted by the Marriage Laws (Amendment) Act, 1976.
4. *Angrez Kaur* v. *Baldev Singh*, AIR 1982 P & H 339 at p. 342 : (1982) 2 DMC 369 ; 1982 Cut LJ (Civil & Cri) 439 ; 1982 Marriage LJ 408.

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[1][13-B. **Divorce by mutual consent.**—(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment)Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they heve mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.]

Comments

Section 13-B is based on the concept of a broken-down marriage. It is impossible to apply the provisions of Section 23 (1) (a) to a proceeding in which relief is claimed under Section 13 (1-A) or Section 13-B.[2] It makes provision for divorce by mutual consent. On a joint petition by the spouses on the ground that they have been living eparately for a year or more, that they have not been able to live together, and that they have agreed that the marriage should be dissolved. On the motion of both parties made not earlier than 6 months after the date of the presentation of the petition and not later than 18 months after the said date the Court after satisfying itself that the marriage was solemnized under the Act and the averments in the petition were correct shall pass a decree for divorce. There is nothing more to be proved in addition to that laid down in Section 13-B. The view that a ground which existed earlier, in addition to that contained in Section 13-B should also be proved would result in nullifying the very object of providing this new ground of divorce by insertion of Section 13-B. Adding any further requirement to that provided in Section 13-B is not even a reasonable and practical construction of the provision apart from being contrary to its clear meaning.[3] Where divorce is sought by mutual consent under Section 13-B, the Court has to satisfy itself under Section 23 (1) (b) that such consent has not been procured by force, fraud or undue influence. During the pendency of appeal if both parties submit compromise application agreeing to dissolution of marriage, compromise is neither unlawful nor the result of collusion between the parties. The Court can dissolve

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1. Section 13-B inserted by the Marriage Laws (Amendment) Act, 1976.
2. *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167 at p. 177 (FB).
3. *Ravishankar* v. *Smt. Sharda*, AIR 1978 MP 44 at p. 45 (DB) [1977 MPLJ 784 (DB).

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the marriage by agreement of the parties, even if none of the grounds on which Court can dissolve marriage exist.[1]

14. No petition for divorce to be presented within one year of marriage.—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, [2][unless at the date of the presentation of the petition one year has elapsed] since the date of the marriage :

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented [2][before one year has elapsed] since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after [2][expiry of one year] from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [2][expairation of one year] from the date of the marriage, the Court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the [2][expiration of the said one year].

SYNOPSIS

1. Object and scope of.
2. Proviso to sub-section (1).
3. Case of exceptional hardship.
4. Cases of exceptional depravity.
5. Premature presentation of the petition.

1. Object and scope of.—Section 14 provides restrictions presumably designed to prevent hasty recourse to legal proceedings before the parties have made a real effort to save their marriage from disaster. It is grounded on public policy because marriage is the very foundation of civil society, and

1. *Indrawal* v. *Radhe Raman*, AIR 1981 All 151 at p. 152.
2. Subs. by the Marriage Laws (Amendment) Act, 1976.

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no part of the laws and institutions of a country can be of moral vital importance to its subjects than those which regulate the manner and the conditions of forming and if necessary of dissolving the marriage contract.[1]

2. Proviso to sub-section (1).—The proviso enables the Court in such cases to entertain a petition for a decree of divorce before the statutory period has expired. The procedure relating to the application for special leave to present such petition is to be regulated by the rules as may be made by the High Court in that behalf. Rules have been framed by various High Courts relating to the application for special leave under the section and service for order granting leave *ex-parte* and the procedure to be followed thereafter if the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained. The proviso also lays down in fact that if it appears to the Court at the hearing of the petition, where leave had been granted and not revoked, that leave had been obtained by misrepresentation or concealment of the true nature of the case and the Court is satisfied that the ground for relief exists the Court may although it passes a decree for divorce suspend the operation of the decree by adding a condition that it shall not operate after the expiry of three years from the date of marriage. It is not, however, incumbent on the Court to pass a decree suspending its operation and the Court may in its discretion dismiss altogether the petition for divorce.

In the latter case a petition may be brought on the same grounds after the expiration of the period laid down in the section. The period of three years has been reduced to one year by Section 9 of Act No. 68 of 1976.

3. Case of exceptional hardship.—What is exceptional hardship or depravity has not been defined in the Act, because that must depend upon the facts of each case. If in addition to one of the grounds mentioned in Section 13 for divorce there are other aggravating circumstances such as cruelty or where there are more than one ground for divorce, as for instance, adultery and conversion, cruelty and venereal disease, renunciation of the world and absence of means of maintenance, they will be cases of exceptional hardship under which no spouse can reasonably be expected to put up with his or her lot any longer.[2] Other cases can easily be imagined of such exceptional hardship. For instance, if a husband coerces the wife to sexual intercourse with another abhorrent to her sentiments of morality or if the husband is such a confirmed and chronic addict to drink and narcotics that he creates a hell in the home as a matter of daily routine making the wife's position in the home absolutely impossible and has been at the same time living in adultery with another woman or if the husband has been incurably of unsound mind for the requisite period and is subject to frequent fits of violence making it extremely risky for the wife to continue to live with him, an exception can be made for entertaining the petition before the statutory period.

In *Parvati Rao* v. *Pandurang*,[3] it was held that a petition filed before the expiry of the prescribed period from the date of marriage on the ground

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1. *Meganatha* v. *Sushila*, AIR 1957 Mad 423.
2. *Veena Kumari* v. *Prem Kumar*, 1972 Cur LJ 93,
3. AIR 1959 Nag LJ (Notes) 78.

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that the petitioner wife was being mercilessly beaten by the husband for little or no reason could be entertained and ordered when that ground is made out, as that circumstance would well bring the case within the proviso to Section 14 (1). Two petitions need not be filed for two reliefs under Section 10 (1) and 13 of the Act in view of the rules framed thereunder.[1] The Act does not disturb the position which a customary divorce occupied pefore the enactment of the Act. In the matter of divorce according to custom, it is not necessary for the parties to have again to go before the Court under Section 10 or 13 of the Act and obtain sanction of the Court, in order that divorce for dissolution may be rendered valid.[2] Ordinarily lexicon meanings of 'exceptional', 'hardship' and 'depravity' should be taken into consideration.[3] Section 14 was enacted to discourage young spouses from taking recourse to legal proceedings in frivolous and irresponsible manner. The substance of allegations both in original and amended petitions being same, amendment should be allowed.[4] The Hindu Marriage and Divorce Rules, 1955 (Bom. High Court) are applicable to cases dealt with by Gujarat Court by virtue of Section 88, Bombay Reorganisation Act (1960) read with clause 4 of Adaptation of the Laws (State and Concurrent Subjects) Order, 1960.[5]

4. Cases of exceptional depravity.—The depravity contemplated has reference to the morality or other conduct of the respondent—the respondent may be the husband or the wife. If it is the husband any conduct on his part which is so abhorrent that it will rouse both repulsion and indignation as for instance, his having intercourse with the servants of the house or his bringing a lewd woman into his bed chamber or masturbating in the presence of the wife or indulging in sodomy or bestiality to the disgust of the petitioner, will all be cases of exceptional depravity of the husband. Similar circumstances of conduct and life can be imagined in the case of a woman also. Whether in any particular case the Court will come to the conclusion that a case of exceptional depravity has been made out or not will depend upon the nature of the misconduct and the frequency with which it is indulged in and the *animus* to inflict pain and misery upon the other spouse by such depraved conduct. In *Meganatha* v. *Sushila*,[6] the scope of the enquiry before the Court in the matter of admitting a main petition before the prescribed time on the ground of exceptional hardship or depravity was pointed out. It is for the judge who hears the application to say whether in the circumstances a *prima facie* case of exceptional hardship or depravity has been made out. In deciding this point, he is not expected to try the main petition in advance. He has merely to decide whether the allegations made in the affidavit or the application are such that if proved they would amount to exceptional hardship or depravity. Having found that there is a *prima facie* case, it is for him to say whether in the exercise of his discretion he will grant leave for the petition to be filed. It is immaterial that the evidence subsequently given at the hearing of the petition does not support the allegation of exceptional hardship or depravity, though if it appears that leave to file the petition was obtained by any misrepresentation or concealment of the nature of the case, the trial Judge may if he pronounces a decree in it order that it shall not be made absolute until after the expiration of three years from the date of the marriage,

1. AIR 1961 AP 122.
2. (1963) Mad LJ (Cr) 212.
3. *Meganatha* v. *Sushila*, AIR 1957 Mad 423.
4. *Sawita Devi* v. *Pran Nath*, AIR 1967 J & K 89.
5. AIR 1971 Guj 33.
6. AIR 1957 Mad 423.

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or he may dismiss the petition without prejudice to any petition that may be brought after the expiration of the three years. The following general principles may be laid down for guidance in considering what would be treated as exceptional hardship or depravity.[1] Per Denning, L. J.—

(a) adultery with one person is not exceptional depravity ;

(b) adultery aggravated by desertion in favour of another woman or cruelty to the wife would constitute exceptional hardship to the wife ;

(c) wife having a child by adultery ;

(d) husband committing adultery soon after marriage ;

(e) husband's adultery promiscously with other women ;

(f) adultery with the wife's sister or servant in the house ;

(g) cruelty coupled with aggravating circumstances such as drunkenness and neglect.

Where a person married a girl and immediately drove her on to prostitution and profited by her immoral earnings, it would be a case of exceptional depravity.[2]

5. Premature presentation of the petition.—Application seeking leave to present petition for divorce before expiration of one year of marriage—Grounds of exceptional hardship though made out would not entitle for it as one year period is provided for reconciliation.[3] A petition for divorce filed before the expiry of the period mentioned in Section 14 (1) has to be accompanied by another petition for permission to file it before the said prescribed time. The latter petition must disclose all the facts fully and frankly. No doubt in such a petition for permission for entertaining the main petition for divorce before the time prescribed, notice must go to the respondent, and if on such notice the respondent appears and shows cause why the petition for premature reception of the main petition should not have been entertained on account of the misrepresentation or concealment of the nature the case, the Court has discretion either to pronounce a decree and make it a condition that it shall not be operative until after the expiry of one year from the date of the marriage or it may dismiss the petition. Such a dismissal should not prejudice any fresh petition being filed after the expiry of one year from the date of the marriage upon the same or substantially the same facts as those alleged in support of the dismissed petition. It is for the Court to say whether in the circumstances of evidence before it, a *prima facie* case is made out.[4] An appellate Court will not interfere with the trial judge's discretion unless the latter had proceeded on a wrong principle of law or ignored a material consideration or gross injustice has been caused.[5] The question of leave is

1. *Bowman* v. *Bowman*, (1949) P. 353.
2. *Coleman* v. *Coleman*, (1866) 1 PD 81 ; *Sheldon* v. *Sheldon*, (1937) 106 L & P 44.
3. *Vinod Aurora* v. *Smt. Manju Aurora*, AIR 1982 Delhi 592 : (1982) 1 DMC 352 : 1982 Marriage LJ 376 : 1982 Rajdhani LR 532.
4. *Winter* v. *Winter*, (1944) P. 72, 74.
5. *Meganatha* v. *Sushila*, AIR 1957 Mad 423 ; *Charlesby* v. *Charlesby*, (1947) 176 LT 532,

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decided mainly on the basis of the averments made in the affidavit filed in support of the application for leave. Affidavits if any filed in opposition may also be considered by the Court.[1]

15. Divorced persons when may marry again.—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

[2][* * *]

SYNOPSIS

1. General.
2. Remarriage.

1. General.—The section forms an integral part of a divorce proceeding by which both parties become free and are released to contract a fresh marriage.[3] Section 15 is not applicable to a decree of nullity under Section 12.[4]

Section 15 applies only to the case of dissolution of marriage by a decree of divorce. It does not apply to a decree passed for the annulment of a marriage under Section 13. A decree of divorce stands on a different footing from a decree of nullity. In the former case it postulated valid and effective marriage which by reason of subsequent events had to be dissolved; the latter case postulates a voidable marriage which has been declared void. Section 15 proviso as amended in 1976 is retrospective and therefore has to be read as non-existing.[5] The rule is founded on the principle that it is contrary to public policy and good morals that persons whose marriage is dissolved should be permitted to remarry some other person with indecent haste and aims at ensuring that divorce is sought as an extreme remedy and not for the sheer purpose of marrying some other person. The rule laid down in the section operates only in cases where a decree of divorce is granted under the provisions of the Act. The rule obviously does not effect any decree of nullity of marriage in case of a marriage which was void *ipso jure* of a decree of annulment in case of a marriage which was voidable for as already pointed out the effect of any such decree is to declare that there did not exist a valid and binding marriage between the parties. Reading this section with Section 28 it is clear that any party whose marriage has been dissolved may lawfully marry again where there is no right of appeal against the decree or if there is one the appeal time has expired without any appeal being preferred or where any appeal is preferred after it has been dismissed. The result of the deletion of the former proviso to the section which declared

1. *Winter* v. *Winter*, supra ; *Simpson* v. *Simpson*, (1954) 2 All ER 546.
2. Proviso omitted by Act No. 68 of 1976, Section 16.
3. *Warter* v. *Warter*, (1890) LR 15 PD 152.
4. *Pramod Sharma* v. *Radha*, AIR 1976 P & H 355.
5. *Jamboo Prasad Jain* v. *Malti Prabha*, AIR 1979 All 260,

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that it shall not be lawful for the parties to marry again unless at least one year had elapsed from the date of the decree in the Court of first instance by the Marriage Laws (Amendment) Act, 1976, is that now the parties can contract marriage soon thereafter, provided f course the period of appeal had expired. Though the section does not in terms apply to an application for special leave to appeal to the Supreme Court, the successful party in the High Court who had obtained a decree for dissolution of marriage cannot be marrying again immediately after the High Court's decree deprive the losing party of the chance of preferring an application for special leave to appeal.[1] A decree of dissolution of marriage concerns the status of the parties and operated as a judgment *in rem*,[2] and unless vacated according to law will not abate.[3] The amendment of Section 15 by the Marriage Laws Amendment Act LXVIII of 1976 had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and those proceedings are to be decided as per the amended provisions. Hence Section 15 will have to be read as if there is no proviso.[4] So where after dissolution of his marriage, the first plaintiff had married another woman within one year from the date of the dissolution, such marriage was legal and valid.[5]

2. **Remarriage.**—The Supreme Court had held in *Lila Gupta* v. *Laxmi Narain*,[6] that the former proviso to Section 15 was directory in nature and therefore a marriage effected in violation of the time period specified therein is not void. In regard however to the validity of a fresh marriage contracted after divorce decree before the expiry of the period of limitation for presenting an appeal or where an appeal had been presented during the pendency of that appeal, it has been held under the comparable provisions of Section 57 of the Indian Divorce Act, 1869, that such a marriage is void.[7] Neither this section nor the previous Section 14 will apply to a case either of judicial separation petition under Section 10 or nullity of marriage petition under Section 11 or voidable marriage petition under Section 12. This section applies only to petitions filed for dissolution of the marriage by a decree of divorce whether under Section 13 or under the proviso to Section 14. A decree granting divorce or dismissing the petition for divorce is appealable. The rule does not touch a decree for judicial separation because in case of such a relief marriage continues to subsist and no question of remarriage can arise. Mere severance of all connections with the spouse and allowing it to remarry cannot amount to divorce. Marriage between them still subsists and Section 15 is not attracted.[8] A decree of nullity in favour of wife under Section 12 and the husband preferring appeal against the same, whereas the wife contracted remarriage during the pendency of appeal, appeal becomes

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1. *Chandra Mohini* v. *Avinash Prasad*, AIR 1967 SC 581.
2. *Siddiah* v. *Penchalamma*, AIR 1968 AP 158.
3. *Sunanda* v. *Venkatasubba Rao*, AIR 1957 AP 424 ; Cf., *Lila Gupta* v. *Laxmi Narain*, (1978) 2 SCJ 428 : AIR 1978 SC 1351, 1356.
4. *Chivathai* v. *Narayanaswami*, (1978) 1 MLJ 49 : AIR 1978 Mad 161.
5. *Ibid.*
6. (1978) 2 SCJ 428 : AIR 1978 SC 1351 reversing *Uma Charan* v. *Kajal*, AIR 1971 Cal 307.
7. See *Warter* v. *Warter*, (1890) 15 PD 152 ; *Battie* v. *Brown*, AIR 1976 Mad 347 ; *Turner* v. *Turner*, ILR (1921) Cal 517 ; *Jakson* v. *Jakson*, (1912) 34 All 203.
8. *Ishwar Singh* v. *Smt. Hukam Kaur*, AIR 1965 All 464.

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infructuous and Section 15 is not attracted.[1] This section nowhere overrides even by implication. Section 28 which confers a right of appeal against any decree passed under the Act.[2] Section 15 has no application to a decree of nullity under Section 12.[3]

[4][16. **Legitimacy of children of void and voidable marriages.**—(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.]

SYNOPSIS

1. Case-law prior to substitution by Act 68 of 1976.
2. Scope after substitution of Section 16 by Act No. 68 of 1976.

1. **Case-law prior to substitution by Act 68 of 1976.**—A child begotten or conceived before the decree of nullity of marriage under Section 11 or 12 of this Act, shall not be eligible to any rights in or to the property of any person, other than the parents, *i. e.*, such a child can inherit its parent's

1. *Mohanmurari* v. *Smt. Kusumkumari*, AIR 1965 MP 194 (DB) : (1970) 72 Punj LR 503.
2. *Kishore* v. *Krishna*, AIR 1971 J & K 31.
3. *Pramod Sharma* v. *Smt. Radha*, AIR 1976 Punj 355 (DB) : 77 Punj LR 447 : ILR (1976)1 2 Punj 335.
4. Section 16 Subs. by the Marriage Laws (Amendment) Act, 1976, Section 11.

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property. Children born of void marriage cannot be deemed legitimate where a decree of nullity has not been obtained.[1] Where the statute defines the limits for the purpose of the grant of benefit of legitimacy to children born of void and voidable marriages in a particular way, the Courts are bound to give effect to such limitation without travelling outside those limits on a presumed intention of Legislature. After the death of one of the spouses, a decree of nullity cannot be obtained. On the other hand, in the case of a marriage which is *ipso jure* void under Section 11, in a collateral dispute relating to the succession to the property between the heirs of the parties to the marriage, an ordinary civil court other than a matrimonial court can give a decision that the marriage was a void one but without passing a decree of nullity of the marriage. In such a case, Section 16 cannot be applied ; the children will not get the benefit of legitimacy, and will also loose the right to share in the property of their parents. What renders the marriage invalid is a statutory bar, and there can be no estoppel against it.[2] A marriage declared void in procedure under Section 9 is not governed by Section 16 of the Act. The custody of such a child is to be with the mother and it is an illegitimate child.[3]

The question whether the child born of new wedlock would become legitimate or not need not be considered as Section 16 of the Act may come to the aid of the new child.[4] Children of void or voidable marriage are legitimate until a decree of nullity or of annulment is passed by a Court.[5] While a child born of a void marriage is deemed to be legitimate under Section 16, if a decree of nullity has been granted under Section 11 or Section 12, it is not deemed legitimate if no such decree has been granted. Even where a third party successfully challenges the validity of such a marriage in other proceedings on the ground that it is void by the operation of Section 11, the children of such marriage would still not be deemed legitimate.[6]

2. Scope after substitution of Section 16 by Act No. 68 of 1976.— This section states the legitimacy of children of void and voidable marriages. Sub-section (1) provides for the legitimacy of a child of a void marriage whether the child had been born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of the marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. As regards the issue of voidable marriage, sub-section (2) states that where a decree of nullity is granted, any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved, instead of being annulled is to be deemed their legitimate child despite the decree of nullity. Under sub-section (3) any child of a marriage declared to be null and void or is annulled by a decree of nullity will not have any rights in or to the property of any person other than the parents in any case where but for Section 16 such child would have been incapable of possessing or acquiring any such rights by reason of his or her not being the legitimate child of its parents. According to the Bombay High Court a son born of a void marriage is not entitled to share in property of which his

1. AIR 1964 Mad 118 (DB).
2. AIR 1962 Mad 510.
3. AIR 1961 Punj 331.
4. AIR 1967 SC 581.
5. AIR 1967 Pat 227.
6. (*Causa Omissus* in Section 16 pointed out) AIR 1974 Mad 321.

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father was a coparcener in a partition suit filed by the first with and her legitimate son.[1] The children of void marriages were, only under certain circumstances, treated as legitimate under Legitimacy Act, 1959.

Children born of a marriage which is null and void are not illegitimate. Such children are covered by the expression son and daughter in Class I of the Schedule under Section 8 of Hindu Succession Act and will succeed as heirs to the property of parents.[2]

17. Punishment of bigamy.—Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.

SYNOPSIS

1. General.
2. Marriage, not solemnized with proper ceremonies, is punishable.

1. General.—This section provides for punishment for marriage in contravention of clause (i) of Section 5 and Section 18 provides for punishment to the parties to the marriage in violation of clauses (iii), (iv), (v) and (vi) of Section 5. To attract the provisions of Section 17, the marriage should have been solemnized after the commencement of the Act.[3] This section provides that any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living, and the provisions of Section 494 and 495 of the Indian Penal Code shall apply accordingly. For the section to apply two conditions should be satisfied : (a) the marriage should have been solemnized after the commencement of the Act ; (b) at the date of the marriage either party had a spouse living. The voidness of the marriage under Section 17 is in fact one of the essential party had a spouse living. The voidness of the marriage under Section 17 is fact one of the essential ingredients of Section 494, Penal Code because the second marriage will become void only because of the provisions of Section 17.[4] It is however not necessary that a prosecution under Section 494, Penal Code should have been preceded by a declaration under Section 17 of this Act of the voidness of the second marriage.[5]

2. Marriage, not solemnized with proper ceremonies, is punishable.—Unless the marriage is "celebrated or performed with proper ceremonies and due form", it cannot be said to be "solemnized". It is therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494, Indian Penal Code applied on account of the provisions of the Act,

1. *Hanmanta* v. *Dhondavvabai*, (1976) 78 Bom LR 675 : AIR 1977 Bom 191.
2. *Laxmibai* v. *Limbabai*, 1983 Mh. LJ 103.
3. *Parameshwari Bai* v. *Muthojirao Sondia*, AIR 1981 Kant 40.
4. *Gopal Lal* v. *State of Rajasthan*, (1979) 1 SCJ 825.
5. *Chunamma* v. *Dalappa*, AIR 1958 Mys ; *Smt. Padi* v. *Union of India*, AIR 1963 HP 16, 18 ; *Trilakye Mohan* v. *State*, AIR 1968 Assam 22, 23.

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should have been celebrated with proper ceremonies and in due form.[1] Merely going through certain ceremonies with the intention that the parties should be taken to married will not make the ceremonies prescribed by law or approved by any established custom. The words "whoever marries" must mean whoever validly marries and if the marriage is not a valid one according to the custom of the parties, no question of its being void by reason of its taking place during the life time of the husband or wife of the person marrying can arise.[2] Where from the time of marriage the parties thereto have been received and recognised as man and wife a presumption of valid marriage between them arises and such presumption covers the question as to the performance of the requisite ceremonies of a valid marriage also.[3] Where either the earlier marriage or the subsequent marriage has not been duly "solemnised" no question of bigamy can arise.[4]

In *Thokchan* v. *Baruniton*,[5] it was held that where in a particular community it was very easy to get a divorce under the custom of the community and a husband marries again without getting the first marriage dissolved by the customary divorce, the offence of bigamy is to be punished lightly considering the offence only as a technical one. A Hindu husband marrying with a Christian, the first Hindu wife being alive is punishable under Section 494, I.P.C. read with Section 17 of the Act. The argument advanced by the counsel for the husband that the alleged marriage is not between two Hindus and as such Section 494 and 495, I.P.C. are not applicable does not hold good and cannot be accepted. It would amount to this that a Hindu husband or wife would be able to take a second wife or husband professing a different religion without exposing him or her to liability imposed by the section. That could not obviously be the intention of the Legislation.[6] In a marriage between the parties who are Brahmins there was no direct evidence relating to this 7th step i. e. *Saptapadi* : Ma riage cannot be treated void *ab initio*.[7] The absence of proof about the second marriage which is void by reason of its having taken place with discripant ceremonies no offence of bigamy is committed under

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1. *Baburao Shanker Lokhande* v. *State of Maharashtra*, (1965) 1 SCWR 1979 : 1965 SCD 543 ; AIR 1965 SC 1564 : 1965 AWR (SC) 509 : (1965) 1 Andh LT 11 : 1965 All Cr R 323 : (1965) 2 Cr LJ 544 : 1965 MPLJ 873 : 1965 Mah LJ 561.
2. See *ibid* ; *Baburao Shankar* v. *State of Maharashtra* supra ; *Venkatalakshmi* v. *Parophan Narayana*, AIR 1969 Cri LJ 836 (AP) ; *Bolaram* v. *Surya*, AIR 1969 Assam 90, (mere admission of the second marriage by the accused would not be sufficient to establish a valid second marriage to constitute bigamy) ; *Kanwal Ram* v. *Himachal Pradesh Administration*, AIR 1966 SC 614 ; *Priya Bala* v. *Suresh Chandra*, AIR 1971 SC 1153, (mere admission of second marriage by accused is not evidence of the second marriage for the purpose of bigamy when there is evidence that the second marriage had not been performed with the appropriate ceremonies) ; *Kunchitapadam* v. *Soundara*, (1979) LW (Cri) 257 (SB) ; *Venkatasubbarayulu* v. *Venkatayya*, AIR 1968 AP 107.
3. *R. N. Datta* v. *The State*, AIR 1969 Cal 55.
4. *Ibid*.
5. 1961 (2) Cr LJ 258.
6. AIR 1962 AP 446.
7. AIR 1962 AP 311 (DB).

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Section 494, I.P.C.[1] When the form of marriage is not opposed to customs or of community or caste of parties, the presumption is that the marriage is legal.[2] Where a person who is an educated man enter into a second marriage after the coming into force of Hindu Marriage Act, 1955, it is a deliberate disobedience of the law, which under Section 17 of the Act is made punishable under Section 494, Penal Code. The fact that the custom of plural marriage was prevalent in Manipur is no excuse.[3] Where under the customary law of the State divorce is easy and could be obtained at the volition of either party by custom without having recourse to Courts and such customary divorce is saved by Section 29(2) of the Hindu Marriage Act and the offence under Section 494 is committed due to commission on the part of the husband to get the dissolution of his marriage, before he enters into a second marriage after the coming into force of the Act, the Court has to treat the offence as more or less a technical one and serious punishment as provided in Section 494 cannot be given by a Court for his conviction.[4] A suit expressly or impliedly barred—suit by Hindu wife for perpetual injunction restraining her Hindu husband from contracting second marriage comes within Section 9, C.P.C. and jurisdiction of Civil Court to entertain such suit is not excluded by Hindu Marriage Act and the suit is clearly permitted by Section 54 Specific Relief Act.[5] The first wife cannot present a petition under the Act for annulment of husband's second marriage.[6] The power of Court to grant permanent injunction, on application by the husband for permanent injunction against the wife (above 18 years) from her remarrying is not maintainable.[7] The prosecution under Section 494 of the Penal Code is to be in the Court having jurisdiction over the second marriage.[8]

18. Punishment for contravention of certain other conditions for a Hindu marriage.—Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv) [9][and (v)] of Section 5 shall be punishable—

(a) in the case of a contravention of the condition specified in clause (iii) of Section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both ;

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1. 1962 (2) Cr LJ 644 (AP).
2. 1962 Ker LT 487.
3. 1961 (2) Cr LJ 258.
4. 1961 (2) Cr LJ 258.
5. *Shankarappa* v. *Bassamma*, AIR 1964 Mys 247 ; *Seetabai* v. *Ramchandra*, AIR 1958 Bom 116 (FB).
6. AIR 1963 Pat 311 (DB).
7. AIR 1974 Pat 335.
8. *Vasantha Krishna Swami* v. *M. S. Krishna Swami*, AIR 1967 Mad 241.
9. Subs. by Act 2 of 1978.

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(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both [1][* * *]

(c) [2][* * *]

COMMENTS

This section provides that every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v) and (vi) of Section 5 is punishable. The Court which can try an offence under Section 18 is the Court indicated in the Criminal Procedure Code.[3] A further question also deserves consideration, namely, whether the parents, the purchit and others who have helped or otherwise encouraged the aliance violative of any of the clauses mentioned hereof Section 5, will also be liable as abettors of the offence under the abetment sections of the Penal Code. The answer appears to be in the affirmative. See the commentaries under Section 5. Marriage of bridegroom below 18 and/or bride below 15 years is void *ab initio*.[4]

Jurisdiction and Procedure

[5][**19. Court to which petition shall be presented.**— Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition, resides, or

(iii) the parties to the marriage last resided together, or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.]

SYNOPSIS

1. Jurisdiction.
2. Residence.
3. Temporary residence.

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1. Omitted by Act 2 of 1978.
2. Cl. (c) omitted by Act 2 of 1978, Original Cl. (c) ran as follows: "in the case of a contravention of the conditions specified in clause (vi) of Section 5, with fine which may extend to one thousand rupees."
3. *Ramakrishna* v. *Bhaskaran*, AIR 1960 Ker 234.
4. AIR 1975 Andh Pra 193.
5. Section 19 Subs. by the Marriage Laws (Amendment) Act, 1976.

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1. **Jurisdiction.**—This section sets out rules relating to jurisdiction of the Court for any proceeding under the Hindu Marriage Act.[1] It provides that every petition under this Act shall be presented to the District Court.[2] The jurisdiction of the other ordinary Civil Courts like the Munsif's Court and the Subordinate Judge's Court is excluded regarding taking cognisance of any petition under the Act.[3] The District Court here means a City Civil Court where there is one and in any other area the principal Civil Court of original jurisdiction including any other Civil Court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Act.[4] Under clause (i) the forum can be the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised; under clauses (ii) and (iii) it can be the District Court within the local limits of whose jurisdiction the respondent spouse is residing at the time of the presentation of the petition or both the parties to the marriage last resided together. Under clause (iv) it can be the District Court within the local limits of whose jurisdiction the petitioner is residing at the time of the presentation of the petition in a case where the respondent is at that time residing outside the territories to which the Act extends or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of such person had that person been alive. Though the wording of the section may appear to be mandatory it would rather be in keeping with the spirit of the section to confine the mandatory provision "shall be presented to the District Court" and read the later part as to jurisdiction as not mandatory but a provision conferring jurisdiction.[5] A suit for restitution of conjugal rights was tried by Munsif. The objection as to jurisdiction was raised in second appeal which was allowed and the trial by the Munsif was held to be a nullity as the Munsif has no jurisdiction to entertain the suit as it would defeat a fundamental principal namely that such suits must be tried before the Highest Court in the District.[6] The petition on the Hindu Marriage Act presented in the District Court and it was transferred by the District Judge who transferred it to the Additional District Judge as latter has power to dispose of the matter.[7] The High Court has no jurisdiction to entertain and dispose of a suit for declaration of a nullity of a marriage under Section 19 of the Act even where the relief has been valued by the petitioner at an amount above the pecuniary limits of the jurisdiction of the City Civil Court. The Act has conferred an exclusive jurisdiction on the City Civil Court without any qualification that the matter should be within the pecuniary limits of its jurisdiction.[8] The consideration involved as to jurisdiction is to be seen with reference to the context and purpose of statute and the duty

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1. *Manika Das Gupta* v. *Promode Kumar Roy*, AIR 1960 Cal 577; *Kamala* v. *Narayan*, AIR 1958 Bom 12.
2. *Janak Dulari* v. *Narsin Das*, AIR 1959 Punj 50; *Jayawwa* v. *Chinnappa*, AIR 1962 Mys. 130.
3. *Mary Margaret* v. *Premanadhan*, (1958) 1 Andh. WR 283.
4. *Laxman Singh* v. *Kesharbai*, AIR 1966 MP 166.
5. *Gomathi* v. *Natarajan*, (1973) 1 MLJ 246 : AIR 1973 Mad 247.
6. AIR 1961 All 150.
7. AIR 1964 AP 460 (DB); AIR 1960 Cal 565 (DB); AIR 1962 J & K 42 (DB); AIR 1966 MP 166 (DB); AIR 1969 Manipur 93; 1974 All LJ 139 : ILR (1973) 2 All 853; AIR 1959 Punj 50 (DB).
8. AIR 1960 Cal 577.

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of the Court is to grant remedy and not to abdicate its jurisdiction.[1] In a petition for divorce on the basis of Court's earlier decree for judicial separation objection as to the validity of decree for judicial separation on the ground of lack of territorial jurisdiction was raised. It was held that the objection could not been entertained in divorce proceedings.[2] The District Court hears petitions under the Act as a Court and not as a *persona designata*.[3] The only Court that has jurisdiction under this section is the District Court and not any Subordinate Court unless it has been empowered in that behalf by a notification in the Official Gazette by the local Government.[4]

Where the requirement of this section with reference to the jurisdiction of the Court in which the petition should be filed cannot be satisfied, Section 20 of the Civil Procedure Code, will apply and the petition can be entertained by the Court within whose jurisdiction the defendant resides or the cause of action is said to arise.[5] Failure to raise an objection to the jurisdiction does not turn the Court into a legally consisted one if otherwise it does not passes requisite jurisdiction.[6] By reason of Section 29(2) of the Act proceedings for dissolution of marriage under Travancore Nair Act can be taken before Munsiff and not in District Court.[7] Section 19 applies only to petitioner under the Act. Petition under Section 5 of Travancore Ezhava Act (III of 1100) is not and cannot be deemed to be a petition under Hindu Marriage Act.[8] 'Matrimonial Suit' filed under the Act by describing the petition as a plaint can be treated as petition under the Act.[9] The appeal against to Single Judge of High Court—further appeal under clause 10 of Letters Patent is maintainable.[10] The words 'every petition under this Act' occurring in Section 19 have reference to the petitions under Sections 9 to 13 of the Act. The Act does not make any provision for the grant of relief to a spouse interested in getting a declaration that he or she, has already obtained dissolution of marriage according to custom or usage of the community panchayat and that the said dissolution is valid and binding on the two spouses. Similarly there is no provision in the Act, to enable a spouse, against whom a petition is filed by the other spouse, under any of the Sections 9 to 13, to raise a plea in defence that he or she has already obtained dissolution of the marriage from the community panchayat or the like according to custom governing the parties, and that, therefore, the marriage is no longer, subsisting. It must, therefore, be held that the Act which deals with certain matrimonial disputes among the Hindus does not make any provision for adjudication of a claim or defence, that the marriage between the contending parties already stands dissolved by virtue of the decision of a private forum like the panchayat of the tribe, community, group or family, as the case may

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1. AIR 1966 Mys 178 (DB).
2. AIR 1965 Mys 110 (DB).
3. *Pushpa Devi* v. *Radheyshyam*, AIR 1972 Raj 260.
4. *Smt. Balwan Kunwar* v. *Addl. Munsif, Dehra Dun*, AIR 1959 All 7; See also *Satyawati Devi* v. *Ramji Srivastava*, AIR 1971 All 575.
5. *Hartram* v. *Jasoti*, ILR (1962) Bom 554 : AIR 1963 Bom 176.
6. 1969 Kash LJ 90 : AIR 1970 J & K 19.
7. AIR 1971 Ker 44 (FB).
8. 1968 Ker LR 235 : 1968 Ker LT 528 (DB).
9. AIR 1967 Pat. 220.
10. AIR 1969 Punj 25 (DB).

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be. Such adjudication can be obtained only from the Civil Court and not from the matrimonial Court under the Act.[1]

2. **Residence.**—The expression 'residence' does not take in merely casual or temporary visits,[2] and denotes living in a place with the idea of making it a place for living for an indefinite duration for the time being.[3] In Webster's dictionary "to reside" is defined as meaning to "dwell permanently or for a length of time" and words like dwelling place or abode and residence have been held to be synonymous.[4] A person is said to reside in a place if through choice he makes it his abode permanently or even temporarily.[5] He should have the intention to stay for a period, the length of the period depending upon the circumstances of each case. Intention to stay for an indefinite period is not a must.[6] The authorities show that if a man had any kind of a fixed abode in a certain place, he must be regarded as residing there, although he might be temporarily absent for the purposes of health, pleasure or business.[7] In one case, *D'Sousa* v. *Law*,[8] when the spouses were living at Mangalore in the husband's house he was having a lien on his post at the Telegraph Office, Rangoon but had no place there which be could call his residence, it was held that he cannot be deemed to be a resident of Rangoon. If during their temporary absence from their fixed abode the spouses had cohabited together in another place but had previously lived together at their home, they must be considered to have last resided together not in the place where they stayed on a fleeting visit but in the place where their home is situate and where they last cohabited. In *Janak Dulari* v. *Narain Das*,[9] where after marriage the parties lived together in Amritsar for some months, the husband being employed there and subsequently the wife left for Gurdaspur where her sister was staying on account of misunderstanding and the husband paid a brief and flying visit to Gurdaspur for bringing about a reconciliation, it was held that the parties last lived together in Amritsar and not in Gurdaspur since the word "reside" implies something more than a brief visit, and that the Amritsar Court alone has jurisdiction to hear a petition by the husband for the restitution of conjugal rights. But if the man has no such fixed abode or home, the position will be different and the place where they last cohabited even though it was not a permanent place of residence would be considered as the place where they last resided together.[10]

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1. *Damodar* v. *Urmila*, AIR 1950 Raj 57.
2. *Corol* v. *Corol*, AIR 1933 All 39; AIR 1933 All 385; *Walsh* v. *Walsh*, AIR 1927 Bom 230.
3. *David Denis* v. *Mrs. Esthar Denis*, AIR 1951 Nag 248 : ILR (1951) Nag 493; *Carol* v. *Carol*, AIR 1953 All 39; *Robey* v. *Robey*, AIR 1931 Cal 12; *Kershaw* v. *Kershaw*, AIR 1930 Lah 916; *Sarswathi Amma* v. *Kesavan*, AIR 1961 Ker 1274.
4. See *Lambe* v. *Symthe*, 15 LJ Ex 287; *Alexander* v. *Jones*, LR 1 Ex. 133.
5. *Lalithamma* v. *Karran*, AIR 1966 Mys 178; *A. J. Tullock* v. *M. P. Tullock*, AIR 1975 Cal 243 at 246.
6. *A. G. Tullock* v. *M. P. Tullock*, supra.
7. *Ordi* v. *Skinner*, 7 IA 196 at 205.
8. AIR 1940 Mad 564.
9. AIR 1959 Punj 50; See also *Saedawilal* v. *Mst. Kavshalya Devi*, AIR 1957 Punj 84.
10. *Ritchson* v. *Ritchson*, (supra).

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Residence does not imply that the parties must have a house of their own. It is sufficient to ascertain the place where both the parties lived together.[1] The words "reside" and "last resided together" would not include casual visits without intention to reside.[2] For purposes of conferring jurisdiction the parties need not have the intention to reside together permanently.[3] Where the marriage was solemnised at Delhi and the parties last resided together at Chandigarh, the Court at Chandigarh will have jurisdiction apart from the Delhi Court.[4] So also cases may arise where a man has two homes and both the husband and wife may be living in one home for some time and in the other for some other time. In such a case, both the places may be considered as places where they last resided together. The word "together" governs the immediately preceding words "last resided" and not the word "reside".[5] What is contemplated under this section is a petition for relief like restitution of conjugal rights, judicial separation, divorce, etc., and not a criminal complaint for an offence under Section 494 or 495, Indian Penal Code, and a wife can therefore prosecute her husband for bigamy in the Magistrate's Court even after this Act had come into force.[6] So also a right to maintenance claimable by a wife during the subsistence of the marriage can be agitated in a suit before the ordinary Civil Court of the land under Section 9 of the Civil Procedure Code without praying for any of the reliefs mentioned in the Hindu Marriage Act and Section 19 of this Act is no bar to such a suit.[7] In *Lalitamma* v. *Karnan*,[8] it was held that where a husband lived in his father-in-law's place for some time to consummate his marriage with his wife he could be considered to have lived in that place for the purpose of residence under Section 19 of the Act.

The context of Cl. (ii) of Section 19 that the words 'resides' must mean the actual place of residence and not a legal or constructive residence. It certainly does not connote the place of origin. The word 'resides' is flexible one and has many shades of meaning, but it must take its colour and contact from the context in which it appears and cannot be read in isolation. Where the parties to marriage who originally belonged to a village within the territorial jurisdiction of District Judge, Almora got married at New Delhi and the wife resided with her uncle in Delhi ever since the marriage and the husband also was a resident of Delhi being employed there the petition for nullity of marriage under Section 12 find by the husband in the Court of District Judge Almora on the ground that the parties were residents of village within the territorial jurisdiction of that Court would not be maintainable as that District Judge, would have no jurisdiction to try the petition.[9] The word

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1. *Walsh* v. *Walsh*, 29 Bom LR 308.
2. *Dr. Sapriya* v. *Vasudeo Deng*, AIR 1973 All 94; *Ashok* v. *Vishura Bharti*, AIR 1978 All 18.
3. *Santosh Kumari* v. *Om Prakash*, AIR 1977 All 97; *Jagir Kaur* v. *Jasuant Singh*, AIR 1963 SC 1521 followed.
4. *Sushma Dewah* v. *Ajit Kumar*, AIR 1973 P & H 256.
5. *Hazei May Murphy* v. *L. E. Murphy*, AIR 1951 All 180 : ILR (1952) 2 All 723.
6. *Gawri Thimma Reddi* v. *State of Andhra Pradesh*, (1958) 1 Andh WR 230.
7. *Chairramma* v. *Subba Reddi*, (1957) 1 Andh WR 197.
8. AIR 1966 Mys 178.
9. *Smt. Jeewanti Pandey* v. *Kishan Chandra Pandey*, AIR 1982 SC 3.

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"reside" postulates the idea, if not of permanence, at least of some degree of continuance. The expression does not take in merely casual tamporary visits, and denotes living in a place with the idea of making it a place for living for an indefinite duration for the time being.[1] The last residence together need not be for the enjoyment of marital relationship as such. It is the factum of residence and not the purpose of residence, *i.e.* marital [2]

3. **Temporary residence.**—Where a person has a fairly permanent residence at one place, he cannot be said to have a residence at another place where he merely goes for a temporary stay without the intention of remaining there.[3] In one case,[4] where a Military Officer attached to aregiment at Vellore took leave and stayed in Madras in a rented house for some time and then returned to Vellore, it was held that the latter place, namely, Vellore must be considered to be the place where he dwelt. It all depends upon the intention of the parties. In another case,[5] a resident of Mysore which was his permanent place of residence went to Madras with his wife with the intention of staying there for several months, leaving the Mysore house in charge of his servants ; it was held that he must be deemed to dwell in Madras. In the case of Government servants, they must be considered to be dwelling at the place where their service took them, even though they might have dwelling houses of their own in which their parents lived at another place, which they occasionally visited. Where the spouses have no joint permanent home where they can reside together as might happen when both are permanently employed in different districts and the wife visited the husband's place for short intervals, the husband's place where they last resided together though for brief intervals would be the place where they "resided together".[6] It is the factum of residence and not its purpose that is material.[7] The temporary residence of the parties is enough for the purpose of jurisdiction.[8]

20. Contents and verification of petitions.—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded [9][and except in a petition under Section 11, shall also state] that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

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1. 1961 Ker LJ 1274 : 1961 Ker LT 1141.
2. AIR 1974 All 36.
3. *T. J. Poonen* v. *Rati Varghese*, AIR 1967 Ker 1 (FB).
4. 5 MHGR 471.
5. 34 Mad 257.
6. *Saroja* v. *Emmanual*, AIR 1965 Mys 12.
7. *Sirothia* v. *Sirothia*, AIR 1974 All 36 ; *A. J. Tulloch* v. *M. P. Tulloch*, AIR 1975 Cal 243.
8. *Smt. Santosh Kumari* v. *Om Prakash Chopra*, AIR 1977 All 97.
9. Subs. by Marriage Laws (Amendment) Act, 1976.

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SYNOPSIS

1. Contents of petition.
2. Verified statements as evidence.

1. Contents of petition.—This section is a procedural section and states the requirements as to the contents and verification of the petition for any relief under the Act. It deals with the petition for any of the reliefs claimed, whether by way of restitution of conjugal rights or judicial separation or nullity of marriage or divorce. The facts on which the relief is asked for have got to be distinctly stated, and there must also be a statement that there is no collusion between the petitioner and the other parties to the marriage. The facts stated have got to be verified by the petitioner, and if the petitioner happens to be a minor, by his guardian or if he is a lunatic by a next friend or a person appointed in respect of his person by a Court of law. The verification should be in a manner required by law for the verification of plaints. One difference between the allegations in the plaint and the statements in the petition is that while the allegations in the plaint do not by themselves constitute evidence in the case, the verified statements in the petition can be referred to as evidence. This is specially provided for under Section 20 (2). The various High Courts have made rules under Section 21 which would govern the proceedings under this Act and in other respects the proceedings shall be regulated as far as may be by the Code of Civil Procedure. Besides, there are also provisions contained in this Act relating to such proceedings, as for instance, Section 22 for conducting the proceedings *in camera* and prohibition of printing or publication of the proceedings, Section 23 for the decree being passed in the proceedings or its refusal in the particular circumstances mentioned therein, Section 24 dealing with orders for maintenance pending the proceedings and also the costs thereof, Section 25 dealing with alimony and maintenance, Section 26 regarding custody of minor children, Section 27 dealing with disposal of properties which belong jointly to both the spouses in any proceedings under this Act and Section 29 and 28 dealing with the enforcement of decrees and orders and appeals therefrom. Section 39 (1) (i) of the Marriage Laws (Amendment) Act, 1976, provides that pending petitions or proceedings shall be dealt with and decided as far as possible as if they had been instituted under the Act as amended in 1976. Under Section 39 (2) in pending petitions and proceedings, the Court should give opportunity to the concerned parties to amend the pleading in so far as such amendment is necessary to give effect to the provisions of Section 39 (1).

2. Verified statements as evidence.—The provision for referring to the statements in the verified petition as evidence is as already pointed out, a departure from the known position obtaining in Civil Courts, namely, that the statements in the plaint or other pleadings, though verified by the parties concerned, are not evidence, though they may be put in cross examination for contradiction of the evidence given by the party verifying. This however does not mean that the Court is bound to accept the statements in the petition without further evidence or corroboration. The expression used is "may be referred to in evidence" and not "shall be referred to in evidence". This only means that there is a discretion in the Court in appropriate cases to act upon the statements contained in the petition and that no legal objection to such a procedure can be urged as fatal to the conclusions drawn. In *Premchand Hira* v. *Bai Galal*,[1] in regard to a similar provision in Section 47 of the Indian Divorce Act, it has been held that the statements in the petition may be referred to as evidence at the time of hearing but the ordinary practice of the parties giving *viva voce* should invariably be followed in the absence of good reason to the contrary.

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1. AIR 1927 Bom 594.

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21. Application of Act V of 1908.—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908).

COMMENTS

The expression "as far as may be" in the section merely means that all those provisions of the Civil Procedure Code shall apply to proceedings under the Act which are neither inconsistent with any of the provisions of the Act, nor contrary to its scheme or purpose. Under this section all the powers vested in a Civil Court under the Code vest in a Court trying a petition under the Act. The amplitude of such powers is restricted only to the extent it is otherwise provided by the Act or rules framed thereunder. There is no particular provision in the Act restricting the Court's power to grant any relief other than the one specifically asked for in the petition if the facts and circumstances and the findings arrived at justify such grant. Nor is there any provision in the rules disabling a person from seeking the several reliefs in the alternative. Hence a Court trying a petition for divorce is not precluded from granting a decree for judicial separation.[1] The words "as far as may be" in the section indicate that it is the procedure only that is to be regulated by the Code of Civil Procedure but not a substantive right like the right of appeal. The proceeding for divorce or any other relief under this Act being of a civil nature, it is but correct that this section should provide that it should be regulated as far as may be by the Code of Civil Procedure. At the same time, the proceeding under this Act is of a *sui generis* character affecting in a sense not merely the parties to the marriage but the society at large, and naturally the procedure has got to be moulded with reference to this consideration, and therefore this section provides for rules being made by the High Court, which may override with reference to any respect, the procedure provided by the Code of Civil Procedure. The Court has jurisdiction to allow amendment of petition for divorce by adding for relief.[2] The Court has power under this section in a proceeding under the Hindu Marriage Act to apply the provisions of Order 1, Rule 10, Civil Procedure Code, to add a party.[3] There is however no provision in the Act whereby in a petition for divorce against the wife on the ground of adultery the husband can claim damages against the alleged adulterer.[4] The provisions of Order 23, Rule 3 of the Code, enjoining that the Court must pass a decree in accordance with a compromise arrived at between the parties are not, however, applicable in view of the provisions of Section 23 (1) of the Act.[5] In proceedings under the Hindu Marriage Act, the Court can exercise its inherent

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1. *Manjit Kaur* v. *Gurdial Singh*, AIR 1978 P & H 150.
2. *Chucit* v. *Chucit*, (1958) 1 WLR 463 ; *Lewis* v. *Lewis*, (1958) 2 WLR 747.
3. *Ananda Lakshmi* v. *Bhaskara Narasimhan*, (1974) 2 APLJ 293 : (1975) 1 An. WR 188 : AIR 1975 AP 80 ; *Manjit Kaur* v. *Gurdial Singh*, supra ; *Tirukappa* v. *Kamalamma*, AIR 1966 Mys 1 ; *Sunanda* v. *Gundo Pant*, AIR 1961 Bom 225.
4. *Jaswantbhai* v. *Vimal*, AIR 1963 Guj 152.
5. *Ramkuwar* v. *Madanlal*, (1977) 79 Bom LR 143.

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powers under Section 151, Civil Procedure Code.[1] Where the right to continue an appeal does not survive, the sole respondent in the matrimonial proceedings having died, then the appeal as a natural consequence must abate. The effect of such abatement would be that the judgment given by the lower Court becomes conclusive as between the parties or their legal representatives.[2] In *Smt. Anjula* v. *Milankumar*,[3] it was held that the relief in matrimonial matters cannot be granted to the petitioner on the basis of his affidavit only. The amendment of the petition cannot be allowed Order 6 Rule 17 C. P. C. when the parties have already adduced evidence in Trial Court and which has pronounced its judgment.[4] The proceedings on petition are suits and decrees passed therein are appealable under Section 96 C. P. C. and second appeal under Section 100 is competent.[5] By reason of provision under this section the provisions of C. C. P. are made applicable to the proceedings under this Act and the rules made by the High Court.[6] The interlocutory order is revisable and not appealable.[7] The *ex parte* order for dissolution of marriage passed under Madras Hindu (Bigamy Prevention and Divorce) Act can be set aside under the provisions of C. P. C. even after the repeal of the Madras Act.[8] The application to serve interrogatories under Order 11, C. P. C. is applicable to such proceedings by virtue of Section 21 of the Act. Section 141 C. P. C. is no bar to apply procedure of C. P. C.[9] The petition filed in the Court of Civil Judge notified as District Judge under Section 3, the proper forum of appeal is District Court and not High Court.[10] The right of appeal is a substantive right and is not a mere matter of procedure and it is to be regulated by C. P. C.[11] The reference to "any other law for the time being in force" is in relation to act of instituting appeal and not in relation to right of appeal.[12] Order 22 of C. P. C. applies to suits and appeals under Hindu Marriage Act.[13] The order granting interim maintenance is not appealable.[14] Order 11 of C. P. C. is applicable to proceedings under Section 24 of this Act and Section 41 C. P. C. is no bar to apply procedure of C. P. C. The Court can under Section 151 C. P. C. permit interrogatories being served to shorten the prolonged course of interlocutory proceedings.[15] If an application is made during

1. See *Malkhan Rani* v. *Krishna Kumar*, AIR 1961 Punj 42; *Anita* v. *Birendra Chandra*, AIR 1962 Cal 68; *Terlochan Singh* v. *Mohinder Kaur*, AIR 1963 Punj 249; *Bhuneshwar* v. *Dropta Bai*, AIR 1963 MP 259; *Suseelamma* v. *Raghunadha Reddy*, (1977) 2 An. WR 98.
2. *Suhar* v. *Manobar*, ILR (1971) Bom 815 : 74 Bom LR 414 : AIR 1971 Bom 185.
3. AIR 1981 All 178.
4. *Shankar Prasad* v. *Madhubi Paul*, AIR 1982 Cal 474 (DB).
5. *Kusum Lata* v. *Kampta Prasad*, AIR 1965 All 280.
6. AIR 1960 AP 30.
7. *Mohan Rani* v. *Mohanlal*, AIR 1965 J & K 88 (DB).
8. AIR 1964 Mad 463.
9. *Ganga Devi* v. *Krushna Pd. Sharma*, AIR 1967 Orissa 19.
10. 1962 All LJ 432.
11. *Smt. Sarla Devi* v. *Shri Balwan Singh*, AIR 1969 All 601.
12. *Kode Kutumba Rao* v. *Kode Sesharatnamba*, AIR 1967 AP 323 (FB).
13. AIR 1971 Bom 183.
14. *R. P. Muniswamappa* v. *Eramma*, AIR 1968 Mys 8.
15. *Ganga Devi* v. *Krushna Prasad Sharma*, AIR 1967 Orissa 19.

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the course of proceedings under the Hindu Marriage Act, the order made under it is to be followed by C. P. C.[1] The Court can pass a decree directing husband to return to wife her ornaments and other articles in view of Section 21.[2] The order setting aside *ex parte* divorce decree is not appealable.[3] The application for issue of commission to examine witnesses in divorce proceeding where the witnesses are close relatives of applicant, cannot be rejected under Order 26 Rule 4 C. P. C.[4] Section 11 C. P. C. *res judicata* is applicable to the proceeding.[5]

[6][**21-A. Power to transfer petitions in certain cases.**—(1) Where—

(a) a petition under this Act has been presented to a District Court having jurisdiction by a party to a marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same District Court or in a different District Court, in the same State or in a different State,

the petitions shall be dealt with as specified in sub-section (2).

(2) In a case where sub-section (1) applies,—

(a) if the petitions are presented to the same District Court, both the petitions shall be tried and heard together by that District Court ;

(b) if the petitions are presented to different District Courts, the petition presented later shall be transferred to the District Court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the District Court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 to transfer any suit or proceed-

1. *P. C. Jairath* v. *Mrs. Amrit Jairath*, AIR 1967 Punj 148 (DB).
2. *Kamta Prasad* v. *Smt. Omwati*, AIR 1972 All 153.
3. ILR (1975) Cut 909.
4. *Smt. Pramod Saraswat* v. *Shri Ashok Kumar Saraswat*, AIR 1981 All 441.
5. *Nandkishore* v. *Smt. Shanti Kapoor*, AIR 1982 All 138.
6. Section 21-A inserted by the Marriage Laws (Amendment) Act, 1976.

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ing from the District Court in which the later petition has been presented to the District Court in which the earlier petition is pending, shall exercise its power to transfer such later petition as if it had been empowered so to do under the said Code.]

COMMENTS

Section 21-A makes special provision for the transfer of certain proceedings under the Hindu Marriage Act. By virtue of Section 21, Hindu Marriage Act, it is to be held that this special provision excludes the general provisions in the Code relating to transfer. It cannot be contended that Section 21-A would apply only to the situations mentioned therein and that other situations would continue to be governed by Section 24 of Civil Procedure Code.[1] The application by husband for restitution of conjugal rights and by wife for a judicial separation respectively in two different States, the Supreme Court can transfer one to enable consolidated trial.[2] The transfer of matrimonial cases Section 21-A is not exhaustive on subject and does not altogether abrogate power of transfer under Section 24 C. P. C.[3] The consolidation of petitions other than those stated in Section 21-A of this Act is not permissible and Section 23 C. P. C. read with Section 151 cannot be taken the recourse to *A. Priyavari Mehta* v. *Priyanath Mehta*.[4] In the same case their Lordship of the Bombay High Court have held that in a petition under Section 13 of the Act is filed by the wife for divorce in one Court and the husband later files petition under Section 9 for restitution of conjugal rights in another Court, a joint hearing or consolidation of such petitions not being contemplated by Section 21-A the powers of High Court under Section 23 (3) of C. P. C. cannot be exercised and the High Court has no jurisdiction to transfer the case under Section 23 (3) C. P. C. The expression "so far as may be" means that those provisions which are not inconsistants with provision of Act would apply. Section 23 (3) C. P. C. does not stand superceded by new Section 25 which came to be inserted by Act No. 104 of 1976. The scope of Section 23 (3) has to be read along with or supplementary to Section 22 C. P. C. The principle of the section is that the two Courts may not reach two different conclusions and, therefore, it is desirable that only one Court should decide both the cases. As to which of the two should be chosen to do so, preference is indicated for the Court which in point of time was first seized of a similar petition.[5]

[6][**21-B. Special provision relating to trial and disposal of petitions under the Act.**—(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

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1. *Smt. Rama Kanta* v. *Ashok Kumar*, AIR 1977 P & H 373.
2. *Guda Vijayalakshmi* v. *Guda Ramchandra*, AIR 1981 SC 1143.
3. *T. Rama Devi* v. *P. V. Subrahmanyan*, AIR 1982 AP 10.
4. AIR 1980 Bom 337 : 1980 Mh. LJ 269.
5. *Urmila* v. *Kulwinder Kumar Sharma*, (1979) 81 Punj LR 325.
6. Section 21-B inserted by the Marriage Laws (Amendment) Act, 1976.

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(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.]

COMMENTS

The section requires day to day hearing and disposal of petitions within six months of the service of the petition on the respondent, as far as possible. Likewise it enjoins the disposal of an appeal within three months of the service of appeal on the respondent.

[1][**21-C. Documentary evidence.**—Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.]

COMMENTS

The section provides for admissibility in evidence of documents which would not be otherwise admissible for not being duly stamped or registered.

[2][**22. Proceedings to be in camera and may not be printed or published.**—(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.]

SYNOPSIS

1. Publicity is the hall-mark of justice.
2. No discretion to Court.

COMMENTS

1. Publicity is the hall-mark of justice.—In divorce proceedings and other proceedings on account of the nature of the evidence to be given frequently in respect of very delicate matters which would be embarrassing to either party if the public is allowed to be present, it has been the practice even in the western countries to conduct them in camera when it is desired by

1. Section 21-C inserted by the Marriage Laws (Amendment) Act, 1976.
2. Section 22 Subs. by the Mar iage Laws (Amendment) Act, 1976.

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either party or if the Court itself feels that, that would be the proper procedure to be adopted. Under this section every proceeding under this Act shall be conducted in camera. As a corollary to this right, the further provision is made that it shall not be lawful for any person to print or publish any matter with relation to any such proceeding except with the previous permission of the Court. Sub-section (2) of Section 22 lays down the penalty or fine which may extend to Rs. 1,000 in case of contravention of the prohibition against printing and publishing in respect of an unauthorised publication.

2. No discretion to Court.—As a general rule when the evidence is likely to be of a revolting character or wound or injure the susceptibilities and the finer intincts of either party to such an extent that it may seriously tell upon the mind or health of the party, a Court may well decide, though not moved to do so by either party, to conduct the proceedings in camera. But Section 22 (a) is mandatory and the Court has no discretion in the matter. Every proceeding has to be conducted in camera.

23. Decree in proceedings.—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner, [1][except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of Section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified [2][* *] in clause (i) of sub-section (1) of Section 13, the petitioner has not, in any manner, been accessory to or connived at or condoned, the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

[3][(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and]

(c) [4][the petition not being a petition presented under Section 11] is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

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1. The words in brackets in Section 23 (1) (a) inserted by the Marriage Laws (Amendment) Act, 1976.
2. Certain words omitted by Marriage Laws (Amendment) Act, 1976.
3. Clause (bb) inserted by *ibid*.
4. The words in Clause (c) Subs. by Marriage Laws (Amendment) Act, 1976.

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(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case, where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties :

[1][Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13.]

[2][(3) For the purpose of aiding the court in bringing about such reconciliation, the Court may, if the parties so desire or if the Court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the Court if the parties fail to name any person, with directions to report to the Court as to whether reconciliation can be and has been, effected and the Court shall in disposing of the proceedings have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.]

SYNOPSIS

1. Scope and object.
2. "Whether depended or not".
3. "If the Court is satisfied".
4. "Ground tor granting relief exists".
5. "Except in cases where relief on the ground specified in sub-clauses (a), (b) or (c) of Clause (ii) of Section 5".
6. Spouse taking advantage of his or her own wrong or disability.
7. Clause (b) of Section 23 (1) — Absence of connivance or condonation.
8. Condonation and revival of condoned offence.
9. Proof - Consent Duty of Court.
10. Divorce by mutual consent, consent not been obtained by fraud or undue influence.

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1. Proviso to sub-section (2) inserted by Marriage Laws (Amendment) Act, 1976.
2. Sub-sections (3) and (4) inserted by *ibid.*

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11. Whether the provisions of Section 13 are subject to the provisions of Section 23 (1) (a) of the Act—Has Section 23 (1) (a) to be treated non-existent for the purpose of Section 13.
12. Collusion.
13. Unnecessary or improper delay.
14. Justification for the delay.
15. "Wrong"—Meaning of.
16. Clause (e) of Section 23 (1)—Other legal grounds in bar of relief.
17. Reconciliation—Duty of Courts.
18. Pre-marital pregnancy.
19. Clause (4) of Section 23.

1. Scope and Object.—This section contains some vital clauses of considerable importance and consequence relating to the power and duty of the Court in the matter of granting any of the reliefs recognised under the Act. The amended Section 23 is applicable to proceedings pending on 27th May, 1976 and the respondent-wife can amend her pleadings by seeking divorce on the ground of cruelty and desertion and get the relief and proof of the grounds pleaded.[1] The provisions of the Hindu Marriage Act as amended indicate that the amendments effected under Central Acts XLIV of 1964 and LXVIII of 1976 resulted in providing further grounds for divorce and to reduce the period for securing divorce after a decree is passed for judicial separation or for restitution of conjugal rights. Even though repeated amendments were effected to the Act, Section 23 (1) (a) of the Act has remained untouched and it was not considered necessary to delete or modify that section or even to provide for an exception in respect of Section 13 (1-A) of the Act. 'Wrong' under Section 23 (1) (a) has to be comprehended from the circumstances of each case. Section 23, as framed, contemplates that it should be applicable only if instance mentioned therein exist and if the Court is satisfied that such instances exist, then alone relief cannot be granted under the other sections of the Act. Non-compliance of a decree for restitution of conjugal rights or failure to cohabit in the case of a decree for judicial separation, by itself will not be a 'wrong' within the meaning of Section 23 (1) (a) of the Act. To construe that any 'wrong' made out must be the one which is subsequent to the earlier decree will go against the purport and scope of Section 23 (1) (a) which is still retained in spite of amendments. Therefore even if the defaulting spouse is not enable to file a petition for divorce, if the wrong is of a continuing nature, it cannot be held that, merely because it originated even earlier to the first petition and was pleaded in that petition, it cannot be taken of for finding out whether such a conduct of a defaulting spouse is reprehensible enough to constitute a 'wrong' on the date of the presentation of the petition by him for divorce. The limited extent to which relief can be granted, is to hold that the failure to comply with the decree for restitution of conjugal rights and judicial separation, would not constitute a 'wrong', and therefore, such a defaulting spouse can also sue for divorce and nothing more. If the defaulting spouse, as in this case, persists in doing the same wrong, which had formed the ground for the earlier petition filed against him Section 23 (1) (a) will definitely prevent him from seeking relief for divorce. If it can be shown that the person seeking relief under Section 13 (1-A) has committed any further wrong apart from what has been pleaded in the earlier petition, or the wrong already committed is of a continuing nature, and such

1. *Dr. Srikant Rangacharya Adya* v. *Anuradha*, AIR 1980 Kant. 8.

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conduct is serious enough to justify the other party from complying with the decree that has been passed, the amendments effected to the Act do not enable such defaulting spouse to secure a decree for divorce.[1] In granting a decree of nullity on the ground of impotency of husband the power of the Court to grant another opportunity to prove his capacity to consummate marriage is not warranted by law. To call upon wife to once again share her bed with her husband who is proved to be impotent would be nothing short of heaping insults upon her.[2] In matrimonial suits uncalled for enquiries or unnecessary investigation ought to be scrupulously avoided because an unnecessary finding may have the result of standing in the way of reconciliation or approachment that may be effected or hoped for.[3] In matrimonial matters relief cannot be granted to the petitioner on the basis of his affidavit only.[4] Section 11 specifically enables either party to the marriage to have it declared null and void by decree of nullity, against the other party. It does not confine the right to present a petition thereunder to the aggrieved party alone. Secondly the Limitation Act, 1963 does not apply to a suit or proceeding under the law relating to marriage and divorce. A decree for restitution for conjugal rights and its non-compliance by husband would not *per se* constitute such a conduct for refusing a decree for divorce.[5] The subsequent conduct must not only, be mere non-compliance but must amount to positive mis-conduct of such repulsive or of shocking nature as it can be said that he is trying to take advantages of his own wrong.[6] It would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution of conjugal rights has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be 'wrong' within the meaning of Section 23 (1) (a) of the Hindu Marriage Act, the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion. It must be a mis-conduct serious enough to justify denial of the relief to which the husband of the wife is otherwise entitled.[7] Section 23 lays down the circumstance in which alone the Court can decree the relief claimed.[8] The Court can base its decision on admission of parties. The Trial Court's finding on admission of wife and other evidence that child was conceived by petitioner before marriage, it is not right for High Court to remit issue for recording finding on question whether child was conceived after marriage.[9] When a Court grants a decree for divorce on the basis of the statement made by the husband, without giving a judicial finding on the plea of adultery, the Court exercises a jurisdiction not vested in it by law and thus it is a case where the High Court must in its in the exercise of his power of superintendence interfere in order to keep the Court below within four corners if its

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1. *Soundarammal* v. *Sundara Mahalinga Nadar*, (1980) 2 MLJ 121 : 93 LW 186.
2. *Ushman* v. *Indarjit*, AIR 1977 P & H 97 (DB).
3. *Shri Pranab Biswas* v. *Smt. Mrinmayee Dassi*, AIR 1976 Cal 156.
4. *Smt. Anjula* v. *Milankumar*, AIR 1981 All 178.
5. *Smt. Anita Devi* v. *Bachan Singh*, AIR 1980 All 174.
6. *Anil Jayantilal Vyas* v. *Sydhaben*, AIR 1978 Guj 74.
7. *Dharmendra Kumar* v. *Usha Kumari*, AIR 1977 SC 2218.
8. *Jasmail* v. *Gurnam Kaur*, AIR 1975 Punj 225.
9. *Mahendra Nanavati* v. *Sushila Nanavati*, 66 Bom LR 681 : 1965 Mh LJ 335 ; AIR 1965 SC 364.

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legitimate authority.[1] The Court is not relieved of the duty imposed on it by Section 9 (a), when the defendant is absent. The discretion has to be exercised very cautiously and after deliberation. The Court cannot grant such a decree merely because the respondent remained absent and did not adduce any evidence to substantiate his stand.[2] A decree for judicial separation is not in conformity of Section 23, a decree for divorce cannot be passed.[3] If the wife's application for divorce on the ground of husband's bestiality if not proved lesser relief of judicial separation on the ground of cruelty sought at appellate stage cannot be granted because those two reliefs and grounds are entirely different.[4] A petition for dissolution of marriage resulted in a consent decree for judicial separation was held to be in violation of Section 23 (1) and therefore without jurisdiction and divorce could not be granted later on, on the ground that there was no resumption of cohabitation[5] The provisions of Section 23 are mandatory and non-compliance therewith deprives the Court of its jurisdiction to grant a decree for dissolution of marriage. The language of the section according to which strict proof of the cumulative conditions mentioned therein. is necessary unmistakably suggsts that it is for the party who seeks relief of divorce to prove that he or she is not taking advantage of his or her own wrong or disability.[6] This section is mandatory and imposes vital conditions on the power and duty of Court in the matter of granting any relief under the Act.[7]

2. 'Whether defended or not.'—A decree in any matrimonial proceeding under the Act is to be made only upon strick proof of the ground relied upon by the petitioner and it makes no difference whether the proceeding is defended or not. In an *ex parte* case, it is not enough for one of the parties to come forward and say something exactly following the terms of the Act. The proper course for the Court, in an undefended proceeding, is to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner relies for the relief that is claimed.[8] The Court must watch more vigilantly to see that the evidence on which acts is such only as it is entitled to receive. The fact that by allowing the proceeding to go undefended both the parties appear to be equally anxious to see that the relief is granted is precisely a reason why the Court should be strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting evidence which is inadmissible.[9] The Court must also satisfy itself the Act, the safeguards provided in the section are duly observed and insists upon corroborative evidence in proof of a matrimonial offence. The burden of proof of the existence of the ground for relief under the Act rests on the petitioner and the Court hearing matrimonial case is only required to Judge the question of discharge of burden of proof viewing the matter of preponderance of

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1. AIR 1958 HP 15.
2. AIR 1962 MP 211 (DB).
3. *Smt. Hirakali* v. *Dr. R. A. Awasthi*, AIR 1971 All 201 (DB).
4. 1970 Ker LJ 34 : 1970 Ker LT 253.
5. *Smt. Hirakali* v. *Dr. R. A. Awasthi*, AIR 1971 All 201.
6. AIR 1975 J & K 95.
7. *Anupama Misra* v. *Bhagban Misra*, AIR 1972 Orissa 163.
8. *Walsh* v. *Walsh*, (1927) 29 Bom LR 308 ; *Alpp Bai* v. *Ramphal*, (1962) AMP 211.
9. *Russel* v. *Russel*, (1924) AC 687.

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probabilities as in civil proceedings and not as in criminal trial.[1] An order allowing a petition under Section 12 (d) of the Act on the ground that the respondent and her counsel were absent cannot be sustained. In proceedings under the Act whether defended or not the Court must be satisfied that the ground for granting relief exists. It is the duty of Court in every case where it is impossible to do so consistently with the nature and circumstances of the case to make every endeavour to bring about reconciliation between the parties.[2]

3. 'If the Court is satisfied'.—Section 23 is the decree section. It is perhaps the most important section enacted for the purpose of making the Court the final arbiter of the destinies of the spouses with due regard who their mutual relations so that any decree that may be passed conforms to moral standards expected and enforced between the spouses in the conduct of the petition. Even where a cause for relief on any of the grounds laid down in the Act exists the Court has to be satisfied of the conditions in clauses (a) to (e) of Section 23 (1).[3] Though the section uses the expression 'if the Court is satisfied' and not the expression 'if the Court is satisfied' on evidence; the satisfaction of the Court has to be based on evidence led in the case.[4] The proceedings under this Act being essentially of civil nature the word 'satisfied', in Section 23 means 'satisfied on a preponderance of probabilities' and not satisfied beyond reasonable doubt.[5] The previous view, no longer tenable, was that the expression if 'the court is satisfied' means that the matrimonial offence should be proved beyond the reasonable doubt, the reason for insisting on this standard being the grave consequence which follows findings of guilt in matrimonial causes.[6] The fact that the petition is not opposed or undefended does not exonerate the Court from this duty of being satisfied as to the sustainability of the petition.[7] The satisfaction of the Court under this section must be on the basis of the record in the case and not mere probabilities or circumstances surmised or suspected.[8] The Court can arrive at necessary satisfaction on the basis of admission of the parties alone provided they are not shown to be collusive.[9] Where a decree for restitution of conjugal rights has been passed in favour of the husband and it is not shown that there was any collusion or connivance between the parties or that the petitioner has taken any advantage of his own wrong in seeking the relief, the fact that the Judge did not mention specifically of his satisfaction of the provisions of Section 23 (1) (a) would not affect the decree passed.[10] A mere temporary withdrawal by the wife from the society of the husband does not

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1. *D.B. Gopala* v. *Pushpa Veni*, AIR 1982 Kant. 329 (DB).
2. *Rudramma* v. *Somshekharappa*, (1977) 1 Kant LJ 318 (DB).
3. *Dr. N.G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534; *Anupama* v. *Bhaga Ben Misra*, AIR 1972 Orissa 163 : ILR (1971) Cut 447.
4. *Chhoganlal* v. *Sakka Devi*, AIR 1975 Raj 8.
5. *Smt. Hirakali* v. *Dr. R.A. Awasthi*, AIR 1971 All 201.
6. *Earnest John White* v. *Mrs. Kathleen Olive White*, AIR 1958 SC 441; *Chandra Leela* v. *Victor Mathew*, AIR 1956 Hyd. 144. (FB).
7. *Thompsont* v. *Thompsont*, AIR 1941 Rang 193 : 14 Rang 37; *Smt. Hirakali* v. *Awasthi*, (*supra*); *Anupama* v. *Bhag Ban Misra* (*supra*).
8. *Nishat Kumar* v. *Anjali*, AIR 1968 Cal 105.
9. *Mahendra* v. *Sushila*, AIR 1965 SC 364 : 1965 Mh LJ 365 (SC) : 67 BLR 681.
10. AIR 1960 Punj 493.

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amount to withdrawal from society permanently. In such a case the burden of proof is on husband to show that he had reasonable excuse for withdrawing from the society of the wife.[1] Section 23 (1) is mandatory in nature,[1] and if the Court fails to record its satisfaction in the respect of matters set out in clauses (a) to (e) of sub-section (1) of Section 23, the decree would be a nullity.[2] Under Section 23 (3) it is open to the Court while disposing of a proceeding under the Act, to have due regard to the reconciliation proceedings and the conduct of the parties, therein.[3] The satisfaction of Court is to be on the matter of recording, and judgment should not be rendered on mere balance of probabilities and circumstances.[4] In matrimonial causes the Court should always expect to get some corroboration from other evidence or even from circumstances in regard to the material particulars relating to the acts of cruelty alleged by one against the other.[5] The word 'satisfied' means satisfaction by proof beyond reasonable doubt and the standard of proof from the Criminal Law is not a safe or proper analogy.[6] In matrimonial proceedings the burden of proof should be satisfactorily and properly discharged by applicant and respondent putting forward false defence is not regarded sufficient by itself to establish truth of applicant's case.[7] It is a duty of the Court to apply its mind to the applicability of various clauses of Section 23 before disposing of the case, even in the absence of any specific plea.[8]

4. 'Ground for granting relief exists'.—In annulment of marriage on humaniterian grounds, the plea for avoidance of domestic infelicity cannot be allowed.[9] Where wife living separately in a room provided by husband under compromise in proceedings under Section 488 Cr. P. C. and husband having another wife living with him. Such a separation does not amount to desertion.[10] The omission to mention satisfaction by the Court in a decree for restitution of conjugal rights, where no collusion or connivance between the parties or the petitioner had not taken advantage of his own wrong in seeking the relief. Such a decree cannot be set aside on the ground of mere omission of the mention satisfaction.[11] The intentional abandonment by one spouse of the other for a continuous period of two years preceding application under Section 10, and payment of maintenance does not end desertion.[12] The term 'wrong' in Section 23 (1) (a) means an act causing some injury to the other side. A wife living separately from her husband cannot be considered to cause thereby an injury to her husband[13] Section 13 (1-A) is subject to Section 23 (i). A decree in favour of wife for restitution of

1. *Rameshchandra* v. *Smt. Premlata Bai*, AIR 1979 MP 15 (DB).
2. *Manilal Harjivandas* v. *Vangaben Ganesh Bhai*, AIR 1979 Guj. 98.
3. *Ramesh Chandra* v. *Smt. Premlata Bai*, AIR 1979 MP 15 (DB).
4. *Nishit Kumar Biswas* v. *Smt. Anjali Biswas*, AIR 1968 Cal 105.
5. *Yaduray Bansi* v. *Sunderbai*, AIR 1969 Guj. 21 : 10 Guj LR 45.
6. *Dr. H.T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235.
7. *Ibid.*
8. 1966 Cur LJ 825.
9. AIR 1963 Punj 449.
10. AIR 1961 Punj 181.
11. AIR 1960 Punj 493.
12. AIR 1969 Punj 328.
13. AIR 1958 Raj 71

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conjugal rights was passed and there was no resumption of cohabitation for the requisite period. A petition for husband by divorce though maintainable, the Court is competent to dismiss it if husband is at fault.[1] After marriage husband made certain gifts in favour of wife but the wife alleged that those gifts were made with a view to avoid wealth-tax. It was held that even if that he made those gifts with a view to confer some rights on his wife in his affairs that did not bring the case within clause (a) of Section 23 (1) of the Act.[2] Even if for a decree for annulment of marriage, the alleged ground exists at the time of marriage and continuous till institution of proceedings, Court must consider its existence at the date of granting decree.[3] The husband who is respondent in wife's petition for divorce under Section 13 (2) (i) cannot plead any conduct or disability on the part of the wife as bar to her claim for divorce on the ground of second marriage.[4] The husband obtained *ex parte* decree for restitution of conjugal rights against the wife keeping her ignorance about proceeding, and commencement of such proceeding with object of later applying for divorce. It was held that the husband was not entitled to decree for divorce as he was taking advantage of his own wrong.[5] A decree for restitution of conjugal rights was passed against the husband, who did not make any effort to comply with it. He cannot be allowed to take advantage of his own wrong and obtain decree for divorce against the wife.[6] The lower Court refused, on judicious consideration to nonsuit the wife on alleged ground of approbation in a decree for nullity of marriage. It was held that no interference in appeal could be made.[7] The wife obtaining decree for judicial separation on the ground of desertion, the desertion ends and husband is not obliged to seek re-union and resume cohabitation.[8] A decree for divorce cannot be denied on the ground that the petitioner has failed to remedy a wrong such as cruelty which laid to the decree for judicial separation.[9] Section 23 (1) (a) does not bar decree for divorce wherein a prior decree for restitution of conjugal rights was passed and it was not complied with.[10] If the conduct of the plaintiff amounted to desertion of his wife disentitles him to the relief of divorce even if adultery of wife is proved.[11] If there is no resumption of cohabitation after a decree for conjugal rights and the husband is not creating obstruction in wife's way to comply with the decree, he cannot be refused divorce decree.[12] The rule enunciated in Section 23 of the Act which contains overriding provision, is based on the principle that the wrong-doer should not be permitted to take advantage of his or her own wrong while seeking relief

1. AIR 1960 Bom 332.
2. *S.* v. *R.*, AIR 1968 Delhi 79.
3. ILR 1967 Guj 822 : 8 Guj LR 918.
4. *Smt. Lalithamma* v. *R. Kannam*, AIR 1966 Mys 178 : (1965) 2 LR 67.
5. *Capt. B. R. Syal* v. *Smt. Ram Syal*, AIR 1968 Punj 489 : ILR (1968) 2 Punj 388.
6. AIR 1963 Punj 287.
7. *A.* v. *B.*, AIR 1967 Punj 152.
8. *Jethabai Ratanshi Lodaya* v. *Manabai Jethabai Lodaya*, AIR 1975 Bom 88 (DB).
9. *Khushal Gajanrao Vanjari* v. *The Collector*, AIR 1973 Bom 53.
10. ILR (1971) 1 Delhi 6 (FB).
11. ILR (1972) Cut 256 (DB).
12. *Rameshwari* v. *Kirpashanker*, AIR 1975 Raj 28.

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under the Act from the Court. For that matter, it is necessary to take into consideration the conduct of the petitioner who approaches the Court for any relief under the Act. If he or she by his or her own misdeeds forces the other spouse to leave him or her and to stay away, the petitioner cannot be allowed to take advantage of his or her own wrong and asked the Court to perpetuate it. Therefore, the claim of the husband for judicial separation on the ground of desertion when he himself has been guilty of desertion which compelled his wife to stay away from him, has to be disregarded on the principle enacted by Section 23 of the Act.[1]

5. **'Except in cases where relief on the ground specified in sub-clause (a), (b) or (c) of clause (ii) of Section 5'.**—In the case of a petition for a decree of nullity on the ground that the respondent was incapable of giving consent due to unsoundness of mind etc. or though the respondent was capable of according valid consent the respondent was suffering from mental disorder of such degree and to such extent as to render unfit for marriage and the procreation of children or the respondent has been subject to recurrent attacks of insanity or epilepsy the burden of proving the disability is upon the person who sets it up.[2] In *G.* v. *M.*,[3] it was pointed out that where the party has with the knowledge of facts and of the law approbated a marriage with a lunatic and has taken advantage and derived benefit from the matrimonial relation, it would be unfair and inequitable to permit that party to plead that the marriage was a nullity. In order as to nullity a marriage as not having been validly entered into by reason of one of marriage, a mere comprehension of the words or the promises of the marriage ceremony exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language; but may yet be affected by such delusions or other symptoms of insanity as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into.[4]

6. **Spouse taking advantage of his or her own wrong or disability.**—A petition for restitution of conjugal rights may be shown to one who does not deserve any sympathy at the hands of the Court on upon to of his or her being the guilty party responsible for the respondent going away and residing elsewhere. For e. g. If a husband has been consistently callous and cruel to the wife and the wife has therefore to go away either in disgust or in fear, certainly the petition by the husband for restitution of conjugal rights will be dismissed, as, otherwise it will be permitting the petitioner to take advantage of his own wrong. So also in the case of a petition by wife for a similar relief against the husband for desertion the husband can well plead in justification that the immoral habits and nagging nature of the wife were so intolerable that he could not put up with it any longer. Similar circumstance in matters of judicial separation and divorce can easily be imagined. The rule set out in Section 23 (1) (a) constitutes an overriding provision based on the principle that a wrong-doer should not be permitted to take advantage of his or her own wrong while seeking relief under the Act.[5] The "wrong" must be misconduct serious enough to justify denial

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1. *Tara Chand* v. *Smt. Narain Devi*, AIR 1976 Punj 300 : 1975 Hindu LR 435 : 77 Punj LR 319].
2. *Durham* v. *Durham*, 10 P D 80.
3. 10 AC 171 at 186; See *Bani Devi* v. *A. K. Banerjee*, AIR 1972 Delhi 50.
4. *Durham* v. *Durham*, 10 PD 80; *Hancock* v. *Peaty*, LR 1 Prob 341.
5. *Tarachand* v. *Narayan Devi*, AIR 1977 P & H 300.

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of the relief to which the husband or the wife is entitled.[1] Where the applicant entering into marriage with respondent knowing it to be bigamous, does not disentitle her for maintenance on the ground that she is taking advantage of her own wrong.[2]

In Bai Mani v. *Jayantilal Dahyabhai*,[3] it was held that in order to constitute a 'wrong' within the meaning of Section 23 (1) (a), the misconduct must be serious enough to justify denial of the relief to which the alleged wrong-doer is otherwise entitled. Where the respondent-husband had admitted in his evidence before the trial Court that he has connection with his mistress and has been residing with her for more than 11 years and that he has got three children through her, the matrimonial offence of adultery has exhausted itself when the decree for judicial separation was granted to the wife. It is precisely for that reason that the wife sought the decree for judicial separation. It is no doubt true that the husband is continuing to reside with his mistress. But can it be said from that it is a new fact or circumstance subsequent to the decree of judicial separation which amounts to a wrong of such a nature as to disentitle her husband to the relief which he is claiming in the present suit. It is no doubt true that it is a continuous wrong. But, it cannot be said that it is a new fact of circumstance amounting to a wrong which will stand as an obstacle in the way of the husband to successfully obtain the relief which he claims. The only way in which Section 13 (1-A) and Section 23 (1) (a) can be reconciled is that there must be some facts or circumstances occurring after the decree for judicial separation, which would amount to such substantial wrong that in granting a decree for divorce to a defaulting party or a wrong-doer would amount in the circumstances to taking advantage of his own wrong. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously residing with his mistress after the judicial separation has been granted. As a matter of fact, he is trying to exercise his right granted under the amended provision of the Act. There must be some facts or circumstances occurring after the decree for judicial separation which amounts to substantial wrong, that in granting a divorce to a defaulting party separation which amounts to substantial wrong, that in granting a divorce to a defaulting party or a wrong-doer, would amount in the circumstances to giving advantage to his own wrong. The matrimonial offence of adultery having exhausted itself when the decree for judicial separation was granted to the wife and that being precisely the reason that the wife sought, the decree for judicial separation, the husband who is continuing to reside with his mistress, is no doubt, committing a continuous wrong. Therefore it cannot be said that it is a new factor or circumstance amounting to a wrong which will be an obstacle in the way of the husband to successfully obtain the relief which he claims in the divorce proceedings. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously living with his mistress after the judicial separation has been granted.

The question who is at fault is not to be gone into by the Courts. The word "wrong" or disability when read with Section 13 (1-A) is wrong or disability other than a mere disinclination to agree to an offer to resume in pursuance of a decree for restitution. That a decree for restitution can be

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1. *Dharmendra Kumar* v. *Usha Kumari*, AIR 1977 SC 2218.
2. *Govindrao Musale* v. *Sau Anandi Bai*, AIR 1976 Bom 433.
3. AIR 1979 Guj 209.

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executed symbolically under Order 21, Rule 32, Civil Procedure Code, and that a spouse refuses to resume cohabitation in spite of an execution application filed by the other spouse, do not mean that the decree for restitution stands satisfied and the spouse refusing to resume cohabitation is not entitled to file an application for divorce.[1] The wife's plea in an application for dissolution of marriage by the husband on the ground of non-compliance with the decree for restitution of conjugal rights that the husband had refused to let her resume cohabitation would be no ground to disentitle the husband to the relief of dissolution of marriage.[2] The grounds for granting relief under Section 13 including sub-section (1-A) are subject to the provisions of Section 23 of the Act. The expression "petitioner is not in any way taking advantage of his or her own wrong" occurring of the statutory right to obtain dissolution of marriage which has been conferred on him by Section 13 (1-A). In order to be a 'wrong' within the meaning of Section 23 (1) (a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of re-union, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.[3] Mere non-compliance with the decree for restitution does not constitute a wrong within the meaning of Section 23 (1) (a) of the Hindu Marriage Act.[4] It is held that Section 13 (1-A) does not confer an absolute or unrestricted right on a party to obtain a decree for divorce and the Court must take into consideration Section 23 (1) and not to grant relief to a party who is taking advantage of his own wrongs.[5] Another view is that it is not permissible to apply the provisions of Section 23 (1)(a) based as they are on the concept of wrong disability to proceedings in which relief is claimed under Section 13 are on the concept of wrong disability to proceedings in which relief is claimed under Section 13 (1-A) based as they are on the concept of a broken-down marriage.[6] Any way the conduct which should weigh under Section 23 (1) has no reference to remitting the wrong which led to the decree of judicial separation or restitution of conjugal rights, but it must be in the nature of subsequent conduct of the petitioner which may be to reprehensible or repulsive to the conscience of the Court that to grant a decree to such party committing the wrong would be giving premium to such wrong.[7] Living separately by the wife after decree for restitution of conjugal rights against her could not be regarded as a "wrong" because no injury was caused to the other side.[8]

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1. *Santosh Kumari* v. *Mohanlal*, AIR 1980 P & H 325.
2. *Jaswinder Kaur* v. *Kulwant Singh*, AIR 1980 P & H 220.
3. *Dharmendra Kumar* v. *Usha Kumar*, AIR 1977 SC 2218 at pp. 2219, 2220.
4. *Ibid.*
5. *Laxmibai* v. *Laxmichand*, AIR 1968 Bom 332; *Chamanlal* v. *Mohinder Devi*, AIR 1968 Punj 287 : *Syal* v. *Syal*, AIR 1968 Punj 489; *Someswara* v. *Leelavathi*, AIR 1968 Mys 274.
6. *Bimla Devi* v. *Singh Raj*, AIR 1977 P & H 167 (FB).
7. *Anil* v. *Sydhaben*, AIR 1978 Guj 74; See also *Madhukar* v. *Saral*, (1972) 74 Bom LR 456; AIR 1973 Bom 55; *Jethabai* v. *Manabai*, AIR 1975 Bom 88; *Gajna Devi* v. *Purushotham*, AIR 1977 Delhi 178.
8. *Bimla Devi* v. *Singh Raj*, AIR 1977 Punj & Har 167 (FB).

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Where a husband remarried and deserted his wife in the wake of his remarriage whereupon the wife was granted a decree of judicial separation and the husband applied for dissolution of his marriage, Section 23 (1) (a) was held to apply leading to dismissal of his petition.[1] Where a wife petitioned for judicial separation on the ground of the husband having married again the husband cannot be allowed to defeat the petition on the ground that the wife's refusal to live with him was the cause of the second marriage. In such a case it cannot be said that the wife was taking advantage of her own wrong.[2] The wife obtaining decree for restitution of conjugal rights but the husband remaining silent and not showing any inclination to obey decree would not entitle the husband for decree for divorce under Section 23 (1) (a). The entire obligation rested with husband is to make all efforts to obey the decree even if wife applied for maintenance after 55 days : and it would mean that wife is unwilling to join husband.[3] The allegation that the wife obtaining decree for restitution of conjugal rights against the husband refused to receive or reply to the letters written by her husband and did not respons to his other attempts make her to live with him does not amount grave misconduct disentitling the wife to the relief of divorce.[4] The husband's application for judicial separation on the ground of wife having deserted him since 1954 and the petition was filed in 1967, without explaining the delay. Both the spouses lived apart throughout for 21 years, during which there was exchange of letters. The Court of law was helpless to grant to any relief.[5] The ground of desertion is a 'legal ground' for wife to resist the petition of the husband for restitution of conjugal rights under Section 9. Though under Section 23 (a) of the Act, the wife has option to lodge counter-claim and press for judicial separation on the ground of desertion, the fact that she did not lodge the counter-claim would not disable her from resisting husband's petition for restitution of conjugal rights on the ground of desertion. The 'legal grounds' include grounds available for maintenance under Section 18 of Hindu Adoptions and Maintenance Act, 1956. Even these grounds are not exhaustive.[6] The decree for restitution of conjugal rights or judicial separation passed against the party is entitled to divorce under Section 13 (1-A). 'Wrong' referred to in Section 23 (1) (a) has no application merely because party against whom earlier decree was passed applies for divorce. A wrong prior to the passing of the decree is not the wrong contemplated under Section 23 at all and the past conduct cannot be used as a valid defence against the petitioner seeking divorce under Section 13 (1-A) of the Act.[7] Similarly no relief can be granted to a petitioner, where the ground of the petition is adultery or unsoundness of mind or desertion and the petitioner has been guilty of such willful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion ; or where the ground of the petition is cruelty the petitioner was himself or herself guilty of extreme provocation or of cruelty or had without reasonable excuse deserted or had without reasonable excuse separated himself or herself from the respondent and it appears

1. *Raghbir Singh* v. *Satpal Kaur*, AIR 1973 Punj 17.
2. *Mohanlal* v. *Mohan Bai*, AIR 1928 Raj 71 ; *Jenkins* v. *Jenkins*, (1956) 2 All ER 596.
3. *Shantabai* v. *Prabhakar*, 1977 Mh LJ 453.
4. *Dharmendra Kumar* v. *Usha Kumari*, AIR 1977 SC 2218.
5. *Mohindarpal Singh* v. *Smt. Kulwant Kaur*, AIR 1976 Delhi 141.
6. *Medashetti Satyanarayana* v. *Medashetti Veeramani*; AIR 1981 AP 123.
7. *Vatsala* v. *Niranjan*, 1981 Mh LJ 917.

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that in seeking relief from the Court on any of these grounds the petitioner is taking advantage of his or her own wrong; and similarly where the ground of the petition is failure on the part of the respondent to comply a decree for restitution of conjugal rights, the petitioner has himself or herself prevented compliance of the terms of the decree by the respondent. It was laid down that in the case of desertion on which a petition is filed for relief if it is found that the petitioner has committed adultery, that does not necessarily terminate desertion if the respondent did not know of the adultery, and that even if it was known the respondent's conduct was not in any way affected by it. Whether even then the petitioner is not entitled to relief is a matter to be left o the discretion of the Court. But if the adultery of petitioner was prior to he desertion alleged, the burden is on the petitioner to show that the desertion was not the result of the petitioner's adultery but was due to other causes not attributable to the plaintiff's fault or default in the matrimonial conduct.

7. Clause (b) of Section 23 (1)—Absence of connivance of condonation.—The parties whose doings are forgiven is at were, on probation, and is expected to show genuine repentance and good behaviour. If acts of the same kind are repeated the Court should at the instance of the agreement party take into account not only new acts but also the background and the factum of impenitence. The new acts need not be as serious as the older one; but should be ones proving the reversion of the party at fault to its old ways reviving in the mind of the victim the old apprehensions of the harm and injury.[1] In a petition for divorce by wife on the ground that the other wife married by the husband before commencement of Act was living in marital relationship with him wherein, plea of the husband was that wife was living adulterous life and was taking advantage of her own wrong. It was held that wife's adulterous conduct, even if assumed, could not be said responsible for husband's wrong and that her conduct could be termed wrong for purpose of relief claimed.[2] By mere efflux of time it cannot be said that husband condoned or connived at the acts of adulterous intercourse by wife.[3] 'Is living in adultery' means a continuous course of adulterous life as distinguished from one or two lapses from virtue. Condonation by husband of his wife's living in adultery mean cohabitation by him with his wife even after coming to know that she was living in adultery.[4] In a petition by husband for restitution of conjugal rights wife resisted the same on the ground of husband having first wife, is a valid ground and principle of condonation is not applicable.[5] The fact that the husband cohabited with wife even after knowledge that she had been guilty of cohabiting with another person would be sufficient to constitute condonation.[6] The resumption of cohabitation after desertion must be with the intention of forgetting and remitting the wrong on condition that the spouse commits no further matrimonial offence. If a further matrimonial offence is committed the condonation is cancelled and the old cause of complaint is revived.[7] In matrimonial law in general condonation involves forgiveness

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1. 1962 Jab LJ 442 : 1962 MPLJ 617.
2. 78 Mad LW 698 : 1965 Mad WN 312.
3. AIR 1964 All 486.
4. AIR 1958 Bom 264.
5. AIR 1962 Punj 183.
6. *Chandramohini* v. *Smt. Prasad*, AIR 1967 SC 581.
7. AIR 1970 Bom 341.

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confirmed or made effective by reinstatement. Normally sexual intercourse is evidence of both forgiveness and reconciliation and raise a presumption of condonation in the case of either spouse.[1] In every matrimonial cause founded on cruelty, the Court has to be first satisfied that the cruelty complained of has not been condoned in any manner. Then and then only Court can grant relief petitioning spouse prays for. Mere forgiveness is not condonation; to be condonation, it must be completely restore the offending party and must be followed by cohabitation.[2] A relief prayed for on the ground of cruelty, the petitioner should establish last acts of cruelty and cannot fall back on previous instance of similar character and that cruelty must have not been condoned by the petitioner before filing petition.[3] Even though condonation is not pleaded as a defence by the respondent it is Court's duty, in view of the provisions of Section 23 (1) (b), to find whether the cruelty was condoned by the appellant. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration. The evidence of condonation in this case is, as strong and satisfactory as the evidence of cruelty.[4] Though the plea of condonation is not raised in the lower Court the court can refuse relief to the petitioner if it is satisfied that the petitioner condoned the acts complained by him. In order to establish a plea of condonation it is sufficient if the wife is received back into the position of a wife in home.[5] Thus where the petitioner acknowledges the birth of the children, informs the municipal authorities writes to his parents in-law to send sweets and continues the service of his clerk although he suspects of his behaviour his conduct amounts to condonation of the conduct of his wife.[5] If there has been condonation of the alleged act of cruelty then the provision of Section 23 (2) will bar the grant of relief of judicial separation. But fresh acts of cruelty will give a fresh cause of action for relief.[6] In the nature of things it would not be conducive for a married life, to rush to Court for relief the moment one party commits an act of cruelty. The party will tolerate and give time to stabilize the marital relations. It is only when the misconduct of a party is totally unbearable i. e. it amounts to "last straw" that the other party knocks at the doors of the Court.[7] Neither decree for divorce under Section 23 (1) (b) nor for judicial separation under Section 10 can be granted to husband who has knowingly condoned acts of adultery on his wife's part.[8] Section 13 (1) (c) provides for a petition being presented for a decree of divorce on the ground that the other party has after the solemnisation of the marriage had sexual intercourse with any person other than his or her spouse. If in a particular case it is shown that the petitioner has been accessory to or connived at or condoned the act complained of in the petition and on which the petition is based, the petition is liable to be dismissed. "Accessory" signifies aiding in producing

1. AIR 1970 Bom 312 : 71 Bom LR 569.
2. (1969) 73 Cal WL 502 : ILR (1970) 1 Cal 272.
3. *Yaduraj Bansi* v. *Sunderbai*, AIR 1969 Guj 21 : 10 Guj LR 45.
4. *Dastane, N. V.* v. *Mrs. Dastane*, (1975) 2 SCC 326 : 1975 Hindu LR 111 : (1975) 3 SCR 967 : AIR 1975 SC 1534 at pp. 1545, 1546, 1549.
5. (1971) 1 APLJ 230.
6. AIR 1952 Nag. 395 (FB); AIR 1964 Ker 102 (FB).
7. 1975 Cur LJ 360 : 1975 Hindu LR 44.
8. *Kharaiti Lal Sharma* v. *Smt. Pushpa Rani*, AIR 1973 Punj 271.

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or contributing to the other of which complaint is afterwards made. It may be the passive permitting of the misconduct as well as the active procuring of its commission. Connivance on the part of the subscribing spouse to the wrong-doing of the offending spouse being an implied consent thereto, one cannot be considered to be injured by or heard to complain of what has been consented to. It is immaterial that the offending spouse was ignorant of the other's connivance of the wrong-doing. Such connivance may be by the wife at the husband's misconduct or it may be by the husband at the wife's misconduct. In either event, it will be a ground for dismissing the petition in the interests of the public. Connivance implies knowledge of and acquiescence in the act complained of.[1] Conniving at adultery means refusing to see an act of adultery but not taking any steps to prevent the adulterous intercourse.[2] Where the husband knew that the association between his wife and another person would lead to adultery but made no effort to prevent it, it would be connivance.[3] Similarly an agreement between the spouses that the husband shall commit adultery with a view to enable the wife to obtain divorce would amount to connivance.[4] In the absence of the intention on the part of the husband that his wife should commit adultery, it cannot be said that connivance by him at her misconduct has been established.[5] But mere imprudence, inattention, or negligence of the husband to the conduct of the wife cannot constitute his connivance at the wife's adultery in the absence of a positive intention on his part that she should commit adultery. Thus, if a husband arranges that his wife and a third person should occupy the house for an evening without interference or interruption and have them secretly watched with a view to find out if adultery is committed by his wife, the husband's object being that it should be committed on account of the opportunity thus afforded, so that he could claim divorce based upon such adultery, and the wife innocent of the said arrangement goes to the house and commits the misconduct, it would be held that there has been a connivance by the husband and therefore he is not entitled to a decree on the ground of the wife's adultery.[6] The connivance may be by the husband or at his instance by his agents. In other words, if the agent of the husband either himself procures the wife's adultery by having intercourse with her or aids and abets another to bring about the wife's misconduct, in either event the husband must be held guilty of the connivance so as to disentitle him to a decree of divorce on the ground of wife's adultery.[7] Mere separation or desertion by one spouse of the other does not amount to a connivance though it does afford opportunity for the other to commit adultery, because in such a situation it connot be posited that the husband or the wife intends that the other should commit adultery. A question may arise whether the adultery by the respondent will not be a ground for divorce or for judicial separation where the adultery committed by the respondent is one in addition to or different from that connived at by the petitioner. The answers to this question

1. *Manning* v. *Manning*, (1950) 1 All ER 602 ; *Gipps* v. *Gipps & Hume*, 11 HLC 1.
2. *Gipps* v. *Gipps & Hume*, 11 HLC 1.
3. *Manning* v. *Manning*, (1950) 1 All ER 602.
4. *Todd* v. *Todd*, LR 1 P 734.
5. *K. G.* v. *K.*, AIR 1952 Nag 395 : ILR (1952) Nag 570.
6. *Douglas* v. *Douglas*, (1950) 2 All ER 748.
7. *Mudge* v. *Mudge and Honeysett*, (1950) 1 All ER 607.

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have not been uniform. But it appears to be the preferable view and stands to sense that since the petitioner has connived at the respondent's misconduct intending that the respondent since the petitioner has connived at the respondent's misconduct intending that the respondent should commit adultery even though the adultery intended was committed with a different person, the petition should be dismissed on account of the connivance. But connivance within the meaning of Section 23 (1) (b) relates only to a connivance at the act charged in the petition. This clause does not postulate that a petition cannot be maintained on account of the adultery merely because some other adultery committed on which the petition is based. In other words if the petition, for instance, for judicial separation is founded on a sexual intercourse had by the respondent and with reference to that no connivance of the petitioner can be found, then that would be a ground for decreeing the petition. But if on the other hand that is the very misconduct which is the foundation of the petition and it has been found that has been connived at the petition has got to be dismissed. The provisions of Section 23 (1) (b) do not apply to a petition for divorce under Section 13 (2) by a wife.[1] There can be no more unjustifying injury to the wife than her own husband doubting her chastity and imputing unchastity to her. If such allegations are lightly made and persisted in when filing the petition under Section 9. The husband s not entitled to any relief.[2]

8. Condonation and revival of condoned offence.—Section 23 (1) casts an obligation on the Court to consider the question of condonation, an obligation which has to be discharged even in undeserving cases. The relief prayed for can be decreed only if the Court is satisfied "but not otherwise" that the petitioner had not in any manner condoned the offence.[3] It is necessary that there should be evidence on the record of the case showing condonation. To constitute condonation there must be two things : forgiveness and restoration.[4] Thare is no condonation unless conjugal cohabitation has been resumed or continued [5] Intercourse is not a necessary ingredient of condonation, though intercourse would raise a strong inference of condonation with its dual requirement of forgiveness and restorati.n.[6] Condonation has been defined to be the forgiveness,[7] either express or implied, by a husband of the wife or by a wife of a husband, for a breach of marital duty with an implied condition that the offence shall not be repeated. It is, however, something more than forgiving, in that there must be a resumption or continuation of the matrimonial status and cohabitation.[8] It may more properly be described as a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed. As a general rule, the condonation of a marital offence deprives the condoning spouse of the right thereafter of seeking

1. *Nirmoo* v. *Mikka Ram*, AIR 1968 Delhi 268.
2. *Smt. Sumanbai* v. *Anand Rao*, AIR 1976 Bom 212.
3. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534 ; See also *Manilal* v. *Gangaben*, AIR 1979 Guj 98.
4. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534 at p 1545.
5. *Samir Kumar Banerjee* v. *Sujata Banerjee*, (1966) 70 Cal WN 633.
6. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534.
7. *Chandrabhagabai* v. *Rajaram*, AIR 1956 Bom 91.
8. *Gopi* v. *Hiriya*, AIR 1935 Nag 49 ; *Smt. Saptami Sarkar* v. *Jagadish*, (1969) 73 CWN 502.

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relief under the Act for the condoned offence. Thus adultery, cruelty, prenuptial unchastity, or pregnancy, and all other marital injuries are condonable offences. However, the doctrine is not applicable to a cause of divorce of a continuing character such as incurable leprosy or communicable venereal disease. Condonation is not revocable and therefore unless forfeited by subsequent conduct, it is a complete bar to any petition based on the same offence.[1] It does not, however, operate prospectively so as to, bar relief on the ground of an offence subsequently committed. Nor does the condonation of one offence warrant an inference that all existing offences of which the petitioner was not aware have been forgiven.[2] A case of adultery with the intention of forgiving and remitting the wrong on condition that the spouse whose wrong is not condoned does not henceforward commit any further matrimonial offence. Condonation therefore consists of a factum of reinstatement and "*animus remitendi*". It is question of fact and it is immaterial that the guilty spouse does not consent to the condonation.[3] In *Cramp* v. *Cramp and Freeman*,[4] it was held that a resumption of sexual intercourse by the husband with his wife with the full knowledge of her adultery is conclusive proof of condonation and cannot be rebutted by evidence that he never forgave her, though that fact is admitted by the wife.[5] The reason is that it would be repugnant to decency to allow a husband to say that he has had sexual intercourse with the wife and yet did not forgive her as he would thereby be approbating and reprobating the marriage; it ought not to be allowed. To constitute condonation, the condoning party must have had knowledge at the time of condonation that the other party was guilty of the act condoned.[6] Where a husband knowing that his wife had committed adultery had continued to cohabit and live with her and subsequently on the basis of such misconduct on the part of his wife managed to get a decree for divorce from the High Court against which the wife had obtained leave to appeal to the Supreme Court, and the husband soon after married and begot a child on the second wife and applied for revocation of the leave to appeal on the husband in continuing to live and have intercourse with his wife even after his knowledge of her misconduct amounted to condonation within the meaning of Section 23 of the Act, and the High Court was in error in granting a decree for divorce in the circumstances, and in any event the husband could not have the leave granted for appeal revoked on the ground of his second marriage. Section 16 would apply to the child of the second marriage.[7]

In all condonation there is implicit a condition that no further matrimonial offence shall occur.[8] A condonation is cancelled if a further matrimonial offence is committed after the condonation,[9] though such matrimonial

1. *Dwarka Bai* v. *Narnan Mathews*, AIR 1953 Mad 800.
2. *Burch* v. *Burch*, (1951) 1 WLR 480.
3. *Wilmog* v. *Wilmog and Martin*, (1948) 2 All ER 123.
4. (1920) P. 158 : 1920 All ER Rep 164.
5. *Benton* v. *Benton*, (1957) 3 All ER 544 ; *Marczuk* v. *Marczuk*, (1955) 3 All ER 758.
6. *Bhagwan Singh* v. *Amar Kaur*, AIR 1962 Punj 144 ; *Khairati Lal* v. *Pushpa Rani*, AIR 1973 P & H 271 ; See also *Emmanual* v. *Mendakani*, AIR 1946 Nag 69 at 71.
7. *Smt. Chandramohini* v. *Avinash*, AIR 1967 SC 581.
8. *Binney* v. *Binney*, (1893) 68 LT 498.
9. *Emmanual* v. *Mandakini*, AIR 1946 Nag 69.

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offence may be of a different type, or not *ejusdem generis* with the original offence or, is of a type which does not give a ground of relief.[1] Thus in the case of adultery condoned, subsequent gross familiarities by the person excused with the stranger with whom the offence was committed, so also subsequent desertion by the husband for however short a time can revive a condoned adultery.[2] Where under a compromise in a wife's petition for judicial separation and maintenance on the ground of cruelty the wife went to live with the husband but being again ill-treated left the husband; it was held in the husband's petition for restitution of conjugal rights that the wife could set up the defence of previous cruelty.[3] Where, however, a wife had agreed for valuable consideration not to take proceedings against her husband in regard to his past cruelty she will be precluded from complaining of such cruelty when he subsequently commits adultery.[4] Though not pleaded, the Court will take note of condonation if proved at the hearing.[5] In such a case the Court will also admit evidence of misconduct subsequent to such condonation, notwithstanding that such misconduct has not been pleaded.[6]

9. Proof—Consent—Duty of Court.—Sections 13-B and 23, upon analysis, demand proof on the following requirements :

(i) That the parties have been living separately for a period of one year or more ;

(ii) that they have not been able to live together ;

(iii) that they have mutually agreed that the marriage should be dissolved ; and

(iv) That the consent of the parties has been obtained not by force, fraud or undue influence.

The Court shall be satisfied that the consent of the parties has been obtained not by force, fraud or undue influence. Although, the relationship between the husband and wife was not recognised to be the special relationship that raised presumption in favour of undue influence, the Court should exercise a greater care and use its hind sight to find out whether the consent accorded by the weaker section was free and not by force, fraud, or undue influence. The duty to ascertain that fact would be greater when the parties were not very much educated. Besides, when there was no contest between the parties, there would be little or no effective cross-examination. The Court, therefore, would not be unjustified if it closely questions the parties to ascertain the nugget of truth behind the impulse to get the marriage dissolved.[7]

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1. See *Constance* v. *Hemry*, ILR 47 Cal 1068 ; *Premchand* v. *Bai Galal*, 51 Bom 1026 ; *King* v. *King*, ILR 47 All 30 : AIR 1927 All 237 ; *Gopi* v. *Hirya*, AIR 1935 Nag 49.
2. *Beigan* v. *Beigan*, (1956) 2 All ER 630.
3. *Jeevarathnammal* v. *Srinivasa*, AIR 1964 Mad 482 : ILR (1964) 2 Mad 579 : 77 MLW 290.
4. *Rose* v. *Rose*, 8 PD 98.
5. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534 ; *Lloyd* v. *Lloyed and Hill*, (1947) P. 89, 91 : (1947) 1 All ER 383.
6. *Suggate* v. *Suggate*, 1 S & T 492.
7. *K. Krishnamurthy Rao* v. *Kamalakshi*, AIR 1983 Kant 235 at pp. 236, 237.

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10. Divorce by mutual consent, consent not been obtained by fraud or undue influence.—The divorce on the ground of mutual consent, such consent has not been obtained by fraud or undue influence, is a new provision inserted by Marriage Laws Amendment Act, 1976. There were disputes and differences between the spouses and the wife filed a suit for judicial separation against husband. During the pendency of the suit the husband wrote a letter to her agreeing to pay her a sum every month as maintenance to her and her children. He agreed to give money for his daughter's marriage expenses. He agreed to give some percentage of bonus received by him. These amount were liable to variation depending on his income. The wife replied on the same day informing him that she would withdraw all allegations and charges made by her in the plaint and that she would file a petition for dismissal of suit. She filed petition for dismissal of the suit and it was dismissed for non-prosecution without costs. The husband paid amounts for a short period but stopped sending amounts afterwards. The wife issued notice and subsequently filed suit for declaration that the latter agreement was binding on him and for arrears. The husband resisted the same as it is opposed to public policy and void, and that the letters was only an offer. It was held that the estrangement between the parties was final and binding and not opposed to public policy.[1] Section 13-B is a provision for divorce by mutual consent and it is based on the concept of broken down marriage and the provisions of Section 23 (1) (a) comes into play only if divorce is sought by mutual consent provided according to Section 23 (1) (bb) such consent has not been procured by force, fraud or undue influence. Where divorce is sought by mutual consent under Section 13-B, the Court has to satisfy itself that the consent of the spouse has not been procured by fraud or undue influence ; otherwise the relief of divorce prayed for cannot be granted.

11. Whether the provisions of Section 13 are subject to the provisions of Section 23 (1) (a) of the Act—Has Section 23 (1) (a) to be treated non-existent for the purpose of Section 13.—Before and after the amendment of the Hindu Marriage Act, the provisions of Section 13 are subject to the provisions of Section 23 (1) (a) of the Act.

It is the accepted rule of interpretation that two provisions of an enactment should be harmoniously construed to give meaning to both the provisions. Section 23 (1) (a) says that even if any of the grounds for granting the relief exists the Court should grant relief only and, not otherwise, when the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief. The amendment to Section 13 must be limited to the extent to which the amendments have been made. They cannot be given an extended operation. Section 13 cannot be taken out of the limits of Section 23 (1) (a). If it were otherwise, the Parliament would have added the words "notwithstanding anything to the contrary" in Section 2 (1) (a), (23) (1) (a) or would have been suitably amended Section 23 (1) (a) itself, as it was well aware of the provisions of Section 23 (1) (a) when Section 13 was amended.[2]

12. Collusion.—Collusion means an agreement or bargain between the parties or their agents whereby the initiation of the suit is procured or its

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1. *Smt. Sandhya Chatterjee* v. *Salil Chatterjee*, AIR 1980 Cal 244.
2. *Geeta Lakshmi* v. *G. V. R. K. Sarveswara Rao*, AIR 1983 AP 111 at pp. 113 and 114 : (1982) 2 APLJ (HC) 405 : 1982 LS (AP) 239 : (1983) 1 Andh LT 118.

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conduct provided for. It applies particularly to an agreement not to be present even when the agreement is disclosed to the Court and where no one is able to indicate any fact which is being falsely dealt with or withheld ; because the Court cannot allow itself to be hampered in ascertaining for itself whether there is danger of a husband or wife obtaining a divorce contrary to the justice of the case. It is, however, open to a party to show that the negotiations with a view to a collusive bargain were abortive or that the collusive agreement is wholly spent in its operation, and therefore even though a petition is dismissed for collusion, it does not prevent a fresh suit free from collusion being afterwards brought but not by supplementary petition.

The fact that both spouses desire a divorce does not make them guilty of collusion, provided they have not entered into any agreement obnoxious to the Court ; and an agreement between the parties not involving an imposition on the Court or a suppression of facts but merely facilitating proof and smoothing the asperities of litigation is not collusive or otherwise objectionable, though it is liable to be looked into by the Court.

Collusion in this section means collusion in the proceedings pending and not collusion in some other proceedings. In *Butler* v. *Butler*,[1] it was held that the fact that the husband had in a previous suit been guilty of collusion would not disentitle him to relief in the present suit. The object of this provision for dismissing the petition on the ground of collusion between the parties is to compel the parties to come into the Court of divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent the blinding of the eyes of the Court in any respect, to oblige them so to act as to enable the Court to be in a position to do justice between the parties.[2] In *Harris* v. *Harris*,[3] in an undefended suit filed by the husband for divorce, the petitioner's wife furnished a photograph of herself to the petitioner's solicitor and attended the hearing to enable her identification, and the petitioner's solicitor paid some money to her for the help thus rendered. In spite of this, the Court held that there had been collusion between her and the petitioner and that a decree should be pronounced. Every matrimonial proceeding is a triangular contest, the Court being a party along with the two spouses, and since no fraud ought to be played on a Court if the Court finds that there has been such a fraud, because collusion is only a species of it, it must set its foot on it with all the power it possesses, and refuse the relief asked for however well-founded it may be. Especially in divorce matters, the power of granting a decree should not be used without attentive circumspection and unremitting vigilance.[4] The dismissal of a petition on the ground of collusion does not however prevent either party from filling a fresh petition which is free from collusion and getting a decree for the relief sought.

The fact that both spouses desire a divorce does not make them guilty of collusion provided they have not entered into any agreement obnoxious to the Court.[5] The same principle will apply to a decree for nullity.[6] There is

1. 1893 P. 185.
2. *Butler* v. *Butler*, 15 PD 66.
3. 31 LJP and M 160.
4. *W. D.* v. *E. D.*, AIR 1933 Sind 27.
5. *Sucharita* v. *Rajinder Kishore*, (1975) Punj LR (D) 79.
6. *Ibid.*

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generally a presumption against collusion.[1] The fact that the respondent also wants a dissolution of the marriage does not necessarily import collusion between the spouses.[2] The Court can examine the admission of guilt by a spouse to see if there is any collusion.[3] If the Court is satisfied about the absence of collusion, it may act on the uncorroborated confession of adultery by a party to the proceedings.[4] If a petition for any of the reliefs under the Act is brought in collusion or prosecuted in collusion with the respondent then it should not be decreed. Collusion is an illicit, secret understanding by which parties who are jointly furthering a common purpose assume the semblance of hostility.[5] Collusion in matrimonial proceedings is regarded as a fraud on the Court, however meritorious the cause for divorce may be. Connivance and collusion are closely related with this difference that connivance is a corrupt consenting of one spouse to the conduct of the other to which complaint is afterwards made, while collusion is a corrupt agreement between the husband and wife for the procurement of a divorce. Such collusive agreement in a divorce proceeding would include not only agreement whereby a valid defence is suppressed but also agreement for making no defence. Along with other circumstances the failure of the respondent to appear and defend may itself be evidence of collusion. Collusion means agreement or understanding between the parties, whereby the Court is made to believe in the existence of truth of the circumstances which to the knowledge of the parties are nonexistant or false and the existence are truth of which is essential for the grant of the relief claimed in the petition.[7] An arrangement arrived at by mutual goodwill is something that Court's are called upon to achieve in proceedings under the Act. In every concert of minds is collusion then the law encourages the desiraole type of collusion by giving it the more respectable term reconciliation in Section 23 (2). The Court can be satisfied about existence of circumstance justifying grant of relief under Section 23 of pleadings or the conduct of the parties.[7] It is a well-established principle of law that no person should be permitted to take any advantage of the fraud committed by himself or herself. When therefore the only ground, on which the plaintiff could have got the decree for divorce set aside, is one of collusion and that ground is made unavailable to her because collusion was impossible without her assistance, she cannot later on approach the Court and seek to be relieved of the consequence of her own fraud.[8] In an application for judicial separation the husband did not contest and a decree on the basis of statement of the wife was passed. It was held that the decree is not legal in view of Section 23 (1) (c).[9]

13. **Unnecessary or improper delay.**—In a matrimonial proceeding, the Court is not bound to pronounce a decree if the petitioner is guilty of unreason-

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1. *Emanuel* v. *Emanuel*, (1945) 2 All ER 494.
2. *Kishore Sahu* v. *Snehaprabha*, AIR 1943 Nag 185.
3. *Amold* v. *Amold*, ILR 38 Cal 907.
4. *John Over* v. *Muriel Over*, 27 Bom LR 251 : ILR 49 Bom 468.
5. *Hall* v. *Hall*, AIR 1933 Sind 70.
6. *Tirukappa* v. *Kamalamma*, AIR 1966 Mys 1 : (1965) 1 Mys LJ 329 (FB).
7. 1970 Cur LJ 343 : 72 Punj LR 470.
8. ILR (1973) Mys 584.
9. 1971 Cut LJ 778.

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able delay.[1] Section 23 (1) (d) enables the court to refuse relief even under the sections kept free from the bar of limitation in case of parties approach the Court after unnecessary and improper delay.[2] It is implicit in the expression "unnecessary or improper delay" that the absolute bar envisaged under Section 23 (1) can operate only where the delay is culpable.[3] In the same case it is further held that before the Court grants relief it must be satisfied that the delay is not due to any such reason as acquiescence in the injury or indifference to the same or some wrong motive for seeking relief after sleeping over the matter for inordinate period the Court can not be used as a place to which the spouses can resort whenever it suits in or her to do so keeping in the meantime the threat of action in reserve against the other spouse and use it after a long time at the slightest provocation at a moment the petitioner thinks suitable.[4] A petitioner for a relief in respect of matrimonial offence is not entitled to slumber over his rights but must come to the Court as earlier as possible because when a man delays, the Court can easily presume that he has not got a serious complaint or that the proceeding is a collusive one.[5] Though this is the outside presumption in most of the cases, there are exceptional circumstances which may be urged as justification for the delay in the presentation of the petition by the petitioner.[6] So far as India is concerned, a spouse especially amongst Hindus, be it the wife or the husband is not expected to rush to the matrimonial Court for the relief immediately a matrimonial offence is discovered. Brought up in an atmosphere of general patience and forbearance, it is rarely that either spouse is provoked to resort to the Court even under the stress of the worst matrimonial offence. Owing to the multifarious reforms that have been undertaken in the interest of women and to owing also to the spread of education among the women-folk in the country, there is now a general awakening of the softer sex to their rights and a general drive to putting them on a position of equality with the male section of the community, a drive which has borne fruit in an Article included in the chapter on Fundamental Rights of the Indian Constitution. Right through one finds in the various section of the Hindu Marriage Act a treatment which does not differentiate between one sex and the other. When the question comes to be adjudged regarding the respective rights, one ought not to shut one's eyes to the background of the Hindu society and the instinctive reluctance especially amongst the women to come to Court and air their grievances against the husbands. So even though the enactment governing the Hindu Marriages has been placed on the statute book, in the future cases that the Courts have to decide with respect to matrimonial offences, the petitions from women are not to be expected to be filed immediately the foundations for the petition have been laid. All the same, the section provides, that any unnecessary or improper delay will have the result in the dismissal of the suit. The development of the society in the west has proceeded on different lines altogether, the community always looking to the future ready to forget the past. In India the development of the society is always based upon the bedrock of the past and

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1. *Annasaheb* v. *Tarabai*, AIR 1970 MP 38 ; *Lakshmi Ammal* v. *Alagiriswami*, (1975) 1 MLJ 228.
2. *Pranab Biswas* v. *Mrinmayee Dassi*, AIR 1976 Cal 156.
3. *Lalithamma* v. *Kannan*, AIR 1966 Mys 178.
4. *Lakshmi Ammal* v. *Alagiriswami*, (1975) 1 MLJ 228.
5. *Manohar* v. *Chandravati*, AIR 1936 Nag 26 ; *May* v. *James*, AIR 1941 Rang 110.
6. *Bannunai* v. *Ratana*, 1966 Jab LJ 690.

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the future is looked up to not as something superior or better but as something which is unknown and may possibly be the worse. It is in this conservative background that the administration of matrimonial justice is to be conducted. If delay alone is to be as it is in the west a fatal objection to the maintainability of a petition for relief on the ground of matrimonial offence, be it adultery, be it venereal disease or any other ground to be found in Sections 10, 12 and 13 most of the petitions may have to be dismissed. Even in the west delay has not always been looked upon as a fatal objection. There is always a marginal discretion given to the Court to ignore the delay even when there is not a very cogent justification for it. In India that discretion must be generously exercised owing to the newness of the rights, the time that must necessarily elapse before the community can be educated into the new order of matrimonial privileges that has dawned upon the Hindu community and as already said the general reluctance and apathy on the part of the people to resort to the Courts. At the same time if even with a due margin for excusing the delay on account of the nature of the Hindu community, its history and background and the sudden newness of the new order of society that is inroading into their culture, there is a feeling in the Court that the delay is still unreasonable and improper there is undoubtedly a competent jurisdiction in the Court to dismiss the petition.[1] The position has been fully set out in *Chinnaperumal* v. *Marryayee*,[2] thus: "No general rule can be laid down as to in what circumstances delay should lead to the non-suiting of an application under the Hindu Marriage Act, for the very simple reason that the delay may be the result of different causes in different cases, for example there is the delay which is intentional and which amounts to acquiescence in which case assistance should be refused straight away. Then there may be what might be called the delay of optimism, namely the aggrieved party still hopes very often on a slender basis that things can be patched up and therefore avoids pushing matters to an issue; and where the indications are such the delay should not lead to the unsuiting of the party who after prolonged optimism is disillusioned and goes to seek the assistance of the Court.

"Then there is the delay of apathy especially, on the part of the women, who generally speaking, are more helpless, than the men in the corresponding class and in such case the party just lets things drift without really grasping the legal consequences and after some years suddenly realises the extremely precarious position to which it has brought itself and then stirs about so as to do something.

"Then there is the delay caused by the party experiencing difficulty in gathering sufficient funds for the expenses of initiating and continuing the proceedings.

"Therefore, the Court should be guided to some extent by the humanitarian principle. The Court should also remember that delay, even when it raises the presumption of acquiescence is liable to explanation and the explanation whatever its worth should be given due consideration.

"The modern trend is to exercise a liberal discretion in cases where relief would have been refused on the ground of unnecessary delay. All these would show that an opportunity should be given to the party to explain the delay and the Court should consider the explanation and then decide whether the petitioner should be unsuited on account of the delay."[3]

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1. *Shanti Devi* v. *Ramesh Chandra*, AIR 1969 Pat 27.
2. (1976) 1 MLJ 85 at p. 89 : AIR 1976 Mad 179 at p. 182.
3. *Chinnaperumal* v. *Mariyayee*, (1976) 1 MLJ 85 at 89 : AIR 1976 Mad 179 at p. 182.

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Delay, however long, is not by itself a bar in a nullity suit, but is relevant when considering want of sincerity, that is, such conduct on the part of the petitioner as ought to estop that person.[1] The onus of proving that the delay is inexcusable is on the respondent.[2] In an *ex parte* case that Court itself may take the objection in obvious cases.[3] Where a husband filed a petition for divorce four or five years after he came to know of his wife's adultery and gave no reason for the delay, a divorce can be refused on the ground of delay alone.[4] If the mere circumstance that there has been delay is sufficient to defeat a decree, every petition based on a charge of nullity would be defeated; for in our society both the husband and wife generally wait and take decisions to go to Court when everything else has been tried and failed. It is only when matrimonial lot becomes intolerable that a party resorts to Court. Where a home is irretrievably broken and the marriage wrecked, the suffering should not further be protracted by dismissing the petition on the ground of delay.

The test is whether the delay is culpable or whether it is in the nature of a wrong. That is why the modern trend is to exercise a liberal discretion.[5] Evidence must be given to explain the delay.[6] The delay must be unreasonable in all the circumstances of the case before it will have the effect of a fatal objection to the maintainability of the petition for relief on account of any of the matrimonial offences mentioned in the Act.[7] Where an application was filed by the husband for restitution of conjugal rights long after the wife had left him and had even obtained an order for maintenance under Section 488, Criminal Procedure Code, the application would be liable to be dismissed under Section 23 on the ground of delay.[8] "Unreasonable" is an expression elastic enough to comprehend all the facts, features and circumstances of the case including the status of the parties, the nature of the offence and the sex of the petition. As between the sexes, on account of the proverbial patience of the mother when there are children of the marriage, the mother generally does not want to break up the matrimonial home on account of the misdeeds of the husband. It is not the same this in India as in England that a divorced wife has to face. In England she may be the object of the pursuit for the man as she has often a marriage portion that might have been settled on her and which she takes on divorce. In India a divorced wife is looked down upon and it is very rarely unless she has alluring means that she can attract men to marry her. Any woman who has been divorced by her husband though for a cause for which the husband is mainly responsible is ooked down upon in India as an unwanted woman likely to pollute the pure treams of social life. Where the population of the female sex which is far in xcess of that of the make sex is not able to find husbands for grow-up girls, increase that number by allowing inroads by discarded or divorced women

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1. *Vinod Chandra* v. *Aruna*, 79 Punj LR 221 : AIR 1977 Delhi 24.
2. *Ibid.*
3. *Ibid.*
4. *Thimmappa* v. *Thimmawa*, (1972) 1 Mys LJ 251 : AIR 1972 Mys 234.
5. *Vinod Chandra* v. *Aruna*, 79 Punj LR 221 : AIR 1977 Delhi 24.
6. *Ammana* v. *Ammana*, AIR 1949 Mad 7.
7. *Sasivarnman* v. *Gnanasunder Kamalam*, AIR 1954 Mad 1018; *Llewellyn* v. *Llewellyn*, (1955) 2 All ER 110.
8. *Teja Singh* v. *Sarjit Kaur*, AIR 1962 Punj 195.

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is not a matter which the society easily tolerates with equanimity, and every one who knows this attitude of her neighbours to a woman divorced generally shoulders at the thought and prefers to put up with her matrimonial lot however intolerable it may be. So if she waits for some time for a short or long duration frevently paying to the Almighty that her husband might reform or that in the interests of the children born to her by the husband she should not break away from him throwing the children into the streets and the husband into the arms of another woman by marriage or otherwise, and is pursuaded to come to Court when her position with the husband becomes absolutely impossible, that is, at a time long after the matrimonial offence which is made the ground of attack, any Court if appraised of all the facts of the sufferings endured by the woman and the promptings of mother-hood which dissuaded her from the expenditiou in the matter of going to the Court for the relief, the Court will surely condone such delay as proper and reasonable and not unnecessary in the circumstances. Whereafter becoming aware of the ground a wife chose not to invoke it in proceedings for divorce, but to cohabit with her husband and beget children and live merrily in her husband's home for a number of years and then to involve the ground because of a misunderstanding which arose long after she entered into matrimony, the Court will have no option but to regard the delay as unnecessary and improper.[1] Though the question of excusing the delay in the matter of the initiation of a matrimonial proceeding is one in the discretion of the Court, it ought not to exercise its discretion in favour of one who has slumbered in sufficient comfort for an inexcusably long time because the inaction on the part of the petitioner in such a case may be due to the fact that he is not sincere in his complaint and that he has acquiesced in the wrong or condoned it.[2] This however does not mean that in every case of delay, the Court is bound to dismiss the petition,[3] as if the Court has no jurisdiction to decree the petition whenever there is a delay which is not reasonable.[4] In *Nimoo* v. *Nikkaram*,[5] it was held that the mere fact that the first wife came to Court with a petition for divorce on the ground of her husband's second marriage 11 years after the Act came into force was not a ground for dismissing the petition for delay where it is found that the petitioner was provoked to file the petition on account of the harassment of the husband in respect of the property of the wife. If both spouses had forgotten about their marriage and never live together for last 22 years, they could no more live together. It would be undesirable to keep a marriage which has broken down irretrievably to be allowed to continue. It is a case where the parties buried the marriage long ago, and it would be too late in the day to revive it.[6] The petition for nullity of marriage after 8 years was filed the delay however long in bringing and proceeding under the A t, is

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1. *Lakshmi Ammal* v. *Alagiriswami Chettiar*, (1975) 1 MLJ 228 at 231 : AIR 1975 Mad 211 ; See also *Shanti Devi* v. *Ramesh Chandra*, AIR 1 69 Pat 27 ; *Thimmappa* v. *Thimmawa*, AIR 1972 Mys 234 ; *Chhaganlal* v. *Sukka Devi*, AIR 1975 Raj 8 ; *Mohinder Pal* v. *Kulwant Kaur*, AIR 1976 Delhi 141.
2. *King* v. *King*, AIR 1930 Cal 418 ; *Boulting* v. *Boulting*, 33 LJP & M 33 ; *Allan Rebert Shah* v. *Mrs. Emyly May Shah*, AIR 1928 Lah 320 ; *Phyllis Irene Highfied* v. *Douglas Highfied*, AIR 1935 Sind 112 ; *Nicholson* v. *Nicholson*, LR 3 P. 53.
3. *Joseph William Carol* v. *Joseph William Caroll*, AIR 1934 Pat. 475.
4. *Sarah Abraham* v. *Pyli Abraham*, AIR 1959 Cal 75.
5. AIR 1968 Delhi 260.
6. *M. Akkamma* v. *M. Jagannathan*, AIR 1981 AP 269.

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not itself a bar, but is merely a factor in considering in any insincerity.[1] Delay of 6-1/2 years after the spouses separated in filing application for restitution of conjugal rights is not fatal to the application where it was shown that incessant efforts were made for an amicable settlement all the time before filing the petition.[2] Section 23 (1) (d) in terms just did not refer to delay merely; what is cautioned against was "unnecessary" or improper delay. The former adjective might possibly have reference to the circumstances which in given cases might or might not amount to extenuating circumstances for the delay. The epithet "improper" would indicate that the Court has to see if the delay has in any material way rendered it difficult for the Court to come to a reasonably satisfactory determination on the issue raised in the proceedings. Where the marriage was in 1957 and the Court was moved in 1974 to have it declared a nullity on the ground of the husband being already married and having a wife, and by the then husband had died and the first wife also had died in 1958 and the lower Court on the evidence found the marriage to be bigamous but that the delay in moving the Court for relief was fatal to holding the dismissal to be improper the High Court observed that the element of delay could not override other considerations, that in any case the time lag in instituting the proceedings could by no means be over-emphasised but must be considered in the proper setting and in the context of various other statutory considerations, the relative importance, the cumulative effect of which the Court had to decide for itself in a reasonable and just fashion.[3] Application for restitution of conjugal rights by the husband was filed long after wife had left petitioner and had even obtained order under Section 488, Cr. P. C. Application was held liable to be dismissed under Section 23 on the ground of delay.[4] In considering the delay the Court should duly bearing in mind that the reasonable possibilities, eventual reconciliation, the effect of the continuous or dissolution of the marriage of the other wife or wives, the manner in which the married life was led by the parties in the past, circumstances responsible for the breakdown, may be appropriately considered.[5] The delay of 21 months for divorce proceeding by wife was held not unnecessary.[6] The positive law on delay is rested on the doctrine 'want of sincerity'. The husband abiding by the marriage for 15 years, and, seeking restitution of conjugal rights meanwhile is a husband prosecuting his action on the ground of the wife's impotency for a side-motive.[7] A petition under Section 13 (2) attracts limitation under Section 23 (1) (d) only and not that under Section 23 (1) (b).[8] The period preceding the coming into force of the Act cannot may consideration in dealing the question of delay in presenting petition under Section 12.[9] The conduct of the parties must be taken into account to see if delay was really culpable.[10] The petition for divorce by wife was filed wherein evidence showed her utter helplessness is a reason to justify the delay.[11] Application

1. *Vinod Dube* v. *Chandra Dube*, AIR 1977 Delhi 24.
2. *Atmaram* v. *Narbada Devi*, AIR 1980 Raj 35.
3. *Pavunambal* v. *Ramaswamy*, (1979) 2 MLJ 273.
4. AIR 1962 Punj 195.
5. AIR 1963 Raj 178,
6. *Jyotish Chandra Guha* v. *Smt. Meera Guha*, AIR 1970 Cal 266.
7. (1969) 73 Cal WC 666.
8. *Smt. Nirmoo* v. *Nikka Ram*, AIR 1968 Delhi 260.
9. *S.* v. *R.* AIR 1968 Delhi 79.
10. AIR 1970 MP 36.
11. *Smt. Lalithamma* v. *R. Kannan*, AIR 1966 Mys 178.

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for restitution of conjugal rights by husband was filed after 10 years from withdrawal by wife from his society and no satisfactory explanation was given for such inordinate delay. It was held that the decree in favour of husband is not sustainable.[1] When dealing with the question of delay, one should not be oblivious of the background and tradition of Hindu Society and the instinctive reluctance amongst the women to come to Court and seek redress of their grievances against the husband.[2] If the delay is not explained in a petition for dissolution of the marriage, the dissolution is liable to be refused.[3] Where the husband first came to know that the wife had committed adultery 4 or 5 years prior to the filing at the petition the decree for divorce could be refused on the sole ground of unnecessary and improper delay in instituting proceeding.[4] Where the husband claimed restitution of conjugal rights 4 years after the wife left his house and such inordinate delay was not explained by him, the petition under Section 9 could not be allowed.[5]

Where it was not apparent from the record that there was any intention on the part of the wife to bring cohabitation permanently to an end when she left the husband's place in August, 1969.

At that time a pretext was advanced that there was a marriage in the family of the wife. The intention only became apparent when the later in that year the husband and his brother went to fetch the wife and she did not return to the matrimonial home. Still the husband waited for sometime hoping that good sense may prevail with the wife and she may be willing after lapse of sometime to return to the matrimonial home. Another attempt was, therefore, made in the year 1974 or thereabout at the time of the death of the wife's maternal grandfather, when the families of both the parties assembled and an attempt was made to sort out the differences, so as to bring the wife back to the matrimonial home. Even then the husband was then prepared to take back the wife to her matrimonial home but even thereafter she did not return. Thereafter, it became imperative for the husband to bring forward the petition for divorce as there was no alternative. In these circumstances, it cannot be said that there was any unnecessary or improper delay in filing the petition for divorce which could prove to be fatal.[6]

14. Justification for the delay.—The Court will be inclined to excuse the delay for various reasons, i. e., want of means and poverty on the part of the petitioner, her regard for the feelings of the other members of the family and the honour and prestige of the family, her fear of scandal and a desire to avoid a final break-up, if possible, and her expectation that there were reasonable chances of reconciliation.[7] The following have been held to be justifiable grounds for ignoring the delay :

(1) Poverty and want of means always considered as sufficient ground for excusing the delay.

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1. *Shanti Devi* v. *Ramesh Chandra Roukar and others*, AIR 1969 Pat 27.
2. *A.* v. *B.*, AIR 1967 Puuj 152 ; ILR (1975) HP 409.
3. *Lakshmi Ammal* v. *Alagiriswamy Chettiar*, AIR 1975 Mad 211.
4. *Thimmappa Dasappa* v. *Thimmavva Kon Thimmappa*, AIR 1972 Mys 234 ; *Jasmel Singh* v. *Smt. Gurnam Kaur*, AIR 1975 Punj 225.
5. *Chhaganlal* v. *Smt. Sakha Devi and others*, AIR 1975 Raj 8 : 1975 Hindu LR 446 (Punj) : 1974 Raj LW 291.
6. *Smt. Shanti Devi* v. *Govind Singh*, AIR 1983 Raj 211 at pp. 221, 222.
7. *Alagiriswami Chettiar* v. *Laxmi Ammal*, (1972) 1 MLJ 187.

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(2) Anxiety to avoid publicity and scandal for the sake of the children[1] and the honour of the family in the hope that the respondent would re-form till it becomes impossible to want any longer has been held to be a sufficient ground having regard to the conditions of Indian society.[2]

(3) Delay due to honest effort to bring about a reconciliation between the parties has also been held to be a proper ground for excusing the delay occasioned by such effort.[3] In this case the time taken by the husband to prevail on his wife to mend her evil ways was held excusable.[4]

(4) Wife's hope of reconciliation :[5]

(5) Consideration for the importunity of the mother to desist from precipitating a break in the family :[6]

(6) Patient endurance or cruelty by the wife to avoid shameful exposure :[7]

(7) Exigencies of wife's domestic service :[8]

(8) Discovery of the matrimonial offence only recently.[9]

In Mansfield (falsely called Guno) v. *Guno*,[10] the reason for requiring delay to be explained to the satisfaction of the Court is given as that *prima facie* the mere fact of delay upon a complaint of a matter so fundamental to marriage raises doubts as to the reliability of the evidence of the complainant in support of the complaint,[11] enumerating the various circumstance which have to be borne in mind by the Court when it is asked to condone the delay in filing the petition. Clause (iv) of Section 13 (2) only gives right to repudiate marriage after attaining the age of 15 years and before completing 18 years of age and hence petition for dissolution of marriage by wife after completing 18 years of age is maintainable and there is no unnecessary or improper delay in instituting proceedings.[12]

15. "Wrong"—Meaning of.— Section 23 (1) of the Hindu Marriage Act does not come in the way, if the party wants to take advantage of the

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1. *Simon Stock* v. *Maragatham*, AIR 1966 Mad 224 : *Adelai de Mande* v. *William Albert*, AIR 1968 Cal 133.
2. *Niranjan Das Mohan* v. *Ena Mohan*, AIR 1943 Cal 146 : ILR (1943) 1 Cal 340 ; *Newman* v. *Newman*, LR 2 P. 57.
3. *Gopi* v. *Hiraya*, AIR 1935 Nag. 49 ; *Promode Kumar* v. *Dairy Bai*, AIR 1965 MP 151.
4. *Caroll* v. *Caroll*, ILR 13 Pat 129 : AIR 1934 Pat 475.
5. *Fullerton* v. *Fellerton*, (1922) 39 TLR 46.
6. *Newman* v. *Newman*, (1870) LR 2 P & D 57.
7. *Green* v. *Green*, (1873) LR P & D 121.
8. *Davies* v. *Davies*, (1863) 3 S & T 221.
9. *Brown* v. *Lloyd*, (1957) 2 All ER 212.
10. (1873) 42 LJ (P & M) 65.
11. See also *Smt. Leela* v. *Dr. Rao Anath Singh*, ILR (1963) 13 Raj 425 : AIR 1963 Raj 178.
12. *Bathula Iydaiah* v. *Bathula Devamma*, AIR 1981 AP 74.

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statutory right to obtain dissolution of marriage which has been conferred on him or her under Sec. 13 (1A) and as such a party cannot be said to be taking advantage of his own wrong, when he relies on a statutory right. Further, however, the Supreme Court has explained in the case of *Dharmendra Kumar*, v. *Usha Kumar*,[1] that in order to be a "wrong" within the meaning of Section 23 (1) (a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or wife is otherwise entitled. It is in that way that the Supreme Court has reconciled the apparent conflict in Section 13 (1-A) and Section 23 (1).[2]

16. Clause (e) of Section 23 (1)—Other legal grounds in bar of relief.— The legal grounds contemplated by this clause and which operate as bar to any relief under the Act are grounds stated in the various provisions of the Act itself. A ground for relief cannot be said to exist or to have been established if the requirements of the ground and the conditions relating to the same are not fulfilled and presumably the clause was inserted *exhabundani cautela*. The Court has no power to decree relief on any ground under the Act where any mandatory requirement of the Act which affects the ground itself is not satisfied. The other legal grounds in bar of relief are found in Section 12 regarding consent obtained by fraud and premarital pregnancy, and the period of the ground of grievance mentioned in Sections 11 and 13 and the time for presentation of the petition under Section 14. Amongst the other defences outside the Act are *res judicata*, pendency of another proceedings, and want of jurisdiction in the Court to entertain the petition. Besides it would be contrary to all principle to allow a party to deceive the Court and obtain an advantage from such deceit. The true proposition is that once the issue of matrimonial offence is litigated between the parties and decided by a competent Court, neither party can claim as of right to re-open the issue and litigate all over again if the other party objects. This is what is meant by the statement that estoppel binds the parties. This however does not take away the right and the duty and the part of the Court not to shut its eyes to the truth and in a proper case to re-open the issue or alive either party to re-open it despite the objection of the other party. If the Court is satisfied that in the previous litigation there had been a full and proper enquiry. It will not normally allow another enquiry over again, and if it is not satisfied it will consider it its duty to order a fresh enquiry into the case. In applying this principles there are three catagories to be considered. The first catagory consists of those cases where a charge of matrimonial offence has been established in the previous proceedings where one party has been found guilty. In such a case as between the parties the strict rules of *res judicata* would apply though there is power in the divorce Court to allow a departure from them. The second catagory is where a charge of matrimonial offence was previously made unsuccessfully and the accused was acquitted and the complainant then repeats the charge in a subsequent suit for divorce. The Court will not as a rule allow him to do this. The third category is where a charge of matrimonial offence has been made unsuccessfully before a Magistrate and the complaint repeats the charge in the subsequent suit for divorce. In such a case as between the parties the rules of estoppel would seem to apply, but the divorce Court, which is bound

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1. AIR 1977 SC 2218.
2. *Smt. K. S. Lalithamma* v. *N. S. Hiriyannaiah*, AIR 1983 Kant 63 at p. 67 ; See *Geeta Lakshmi* v. *G. V. R. K. Sarveswara Rao*, AIR 1983 AP 111 at p. 114.

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by no estoppel, almost invariably investigates the charge afresh. The reason is that because it is known that Magistrates are inclined to concentrate more on the question whether the husband ought to pay maintenance to the wife and less on the other issues, however, relevant they may be. At any rate the divorce Court does not consider it satisfactory to leave the matter to be conclusively determined by the Magistrate. The divorce Court regards their finding as evidence but not as conclusive on the issue. Where a decree for a judicial separation has been once obtained on the ground of cruelty and adultery, a new petition asking for dissolution of marriage opon the same facts is not maintainable and that it would not only be contrary to the principle but inconvenient and in some cases highly unjust to permit a party to have two suits about the same matter.[1] Where a petition on the ground of sodomy was dismissed a subsequent presentation of the petition on allegations of adultery, desertion and cruelty will not be barred regarding adultery, desertion and cruelty.[2] Findings in a petition by the husband for restitution of conjugal rights where defence of adultery and cruelty were set up would be relevant in a petition by the wife for dissolution of marriage but would not operate as *res judicata*.[3]

In a proceeding under the Act it is open to the respondent to take objection to the jurisdiction of the Court to entertain the matter. Apart from the objections taken by one or other of the parties, it is a duty of the Court to inquire into and mention in its judgment the facts which give it jurisdiction to pass a decree.[4] As stated earlier, the proceedings under the Hindu Marriage Act being of a civil nature, what is required is that the Court, should be satisfied on a preponderance of probabilities and not satisfied beyond reasonable doubt.[5] In matrimonial proceedings there cannot be judgment by default or admission.[6] Respondent's failure to establish the defence does not mean entitlement of petitioner to relief.[7] Where the Act itself has prescribed a period within which a petition for relief on a particular ground has to be presented the Court cannot entertain the petition after the expiry of the period.[8]

17. **Reconciliation – Duty of Court.**—Before proceeding to grant any relief under the Act, under Section 23 (2) it becomes the primary duty of the Court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case to make every endeavour to bring about a reconciliation between the parties.[9] Cases where estrangement between the spouses appears to be acute are no exceptions.[10] Under the proviso

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1. *Dwarka Bai* v. *Nainan Mathews*, AIR 1953 Mad 792; *Manjula* v. *Ganoti*, AIR 1940 Mad 510 : ILR (1940) Mad 319 : 5 LW 142 : (1940) 1 MLJ 210.
2. *Dwarka Bai* v. *Nainan Mathews*, AIR 1953 Mad 792.
3. *Santhammal* v. *Thangaraj*, AIR 1975 Kant 23.
4. *Kershaw* v. *Kershaw*, AIR 1930 Lah 916.
5. *Dr. N. G. Dastane* v. *Mrs. S. Dastane*, AIR 1975 SC 1534.
6. *Sushila* v. *Mahendra*, AIR 1950 Bom 117.
7. *Santosh Kaur* v. *Meher Singh*, 1966 Cr LJ 417.
8. *Jwubai* v. *Ningappa*, AIR 1963 Mys 3.
9. *Rudramma* v. *Somasekharappa*, (1977) 1 Kant LJ 318; *Neera* v. *Kishan Swarup*, AIR 1975 All 337; *Suryakantam* v. *Ranga Rao*, (1973) 1 An WR 158.
10. *Chhote Lal* v. *Kamal Devi*, AIR 1967 Pat 269; *Jivu Bhai* v. *Lingappa*, AIR 1963 Mys 3.

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to the sub-section when matrimonial relief is sought on any of the grounds set out in clauses (ii) to (vii) of Section 13 (1) the Court need not make an attempt to bring about reconciliation. The words "in the first instance" in Section 23 (2) indicate that the Court's endeavour must be before the granting of relief.[1] It may be the initial stage or at a later stage whenever the Court finds it possible to do so regard being had to the nature and circumstances of the case.[2] The effort should be sincere and effort should not be given up merely on the ground that counsel for one or both parties had stated that there was absolutely no chance for reconciliation.[3] The provisions of the sub-section are mandatory.[4] Merely because the Court can resist in certain cases from reconciliation effort the Court is not relieved at all from exercising its power and discharging its duty under the sub-section.[5] A decree passed (for instance for judicial separation) without endeavouring to bring about reconciliation cannot be maintained.[6] The appellate Court also has to observe the procedure in Section 23 (2) while disposing of appeals under the Act.[7] Section 23 (2) does not apply to a case where one of the parties seeks restitution of conjugal rights.[8] The matrimonial Court can chose with her without suggestion of the counsel of the parties, the time at which reconciliation, wherever possible, and whenever consistently with the nature and circumstances of the case, is practical to be attempted. In an application by husband on the ground of non-compliance of decree for restitution of conjugal rights by wife, prayed for divorce decree, wherein the wife's plea was that the husband refused to let compliance with the decree is of no avail.[9] It is the duty of the Court to try for reconciliation and without it order directing husband to file his objection is illegal.[10] Section 23 (2) is not absolute. A discretion is left to the Court notwithstanding the imposing of a duty on the Court to make every endeavour to bring about a reconciliation between the party.[11] A Court functioning under the Act must endeavour to bring about a reconciliation between the parties. But the mere fact that the Court makes no reference to Section 23 in the order does not imply that the Court was unmindful of this duty. In restitution of conjugal rights proceedings, the reconciliation is achieved only by granting restitution of conjugal rights. It is where the relief of judicial separation or divorce is asked for that the Court should try to avoid the granting of the relief and see if it is possible to bring about reconciliation between the parties.[12] The Court in its anxiety to promote an enforced reconciliation should not condone cruelty even, if the parties are of a comparatively humble status in life and

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1. *Sakri* v. *Chanwarlal*, AIR 1975 Raj 134; *Raghunath Prasad* v. *Urmila Devi*, AIR 1973 All 203.
2. *Raghunath Prasad* v. *Urmila Devi*, (supra).
3. *Ibid.*
4. *Suryakantam* v. *Ranga Rao*, (1973) 1 An WR 158; *Anupama* v. *Bhagban*, ILR (1971) Cut 447 : AIR 1972 Orissa 153.
5. *Anupama* v. *Bhagban*, ILR (1971) Cut 447 : AIR 1972 Orissa 153.
6. *Ibid.*
7. *Suryakantam* v. *Ranga Rao*, (1973) 1 An WR 158.
8. *Ibid.*
9. *Jaswinder Kaur* v. *Kulwant Singh*, AIR 1980 P & H 220.
10. *Ram Kumar* v. *Kamala Datta*, AIR 1981 J & K 9.
11. *Leelawati* v. *Ram Sevak*, AIR 1979 All 285.
12. *Revana Chakradhara Lakshmi* v. *Revana K. Durvasulu*, AIR 1966 AP 73; (1965) 1 Andh LT 276.

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decree restitution of conjugal rights in a *prima facie* case of physical cruelty. The proper approach in cases falling under the Act is laid down in Section 23 (2). It is "reconciliation first". A Court should in the first instance bear in mind that any order it passes should be one calculated to effect reconciliation, and bring man and wife together. In that sense, other things being the same, the granting of conjugal rights being, as it were, compulsory reconciliation, is a correct step, while the converse, namely ordering judicial separation, is one in the opposite direction. On the other hand, the Court should not, in face of grim facts, impose or inflict on the aggrieved party, what it supposes to be a step of reconciliation. There are cases which are beyond reconciliation : and for a Court to act on the motion that a step towards reconciliation should invariably be taken, is in effect, though unintentionally, to encourage the offending spouse to practice cruelty.[1] Trial Court is to make endeavour to bring about reconciliation. Failure does not affect its jurisdiction to try the case. Endeavour can be made by appellate Court also.[2] In a proceeding for restitution of conjugal rights against wife wherein the husband forming impression that subordinate Judge tried to persuade him to submit to humiliation at the hands of the wife the case would be transferred to District Judge.[3] Section 23 (2) casts a duty upon the Court to bring about a reconciliation before it grants relief under the Act. Where the Court does not grant a relief of divorce or judicial separation under the Act but dismisses the application for it, the section is not attracted. In such a case, an appellate Court is not bound to do it.[4]

The philosophy of justice in a matrimonial jurisdiction behoves the Court to strive to restore conjugal harmony. The family being the unit of the nation, its internal unity is the strength of the nation. So it is that the lifestyle of man-and-wife should reflect this, "inner landscape" of the Indian Community. A Judge should, actively stimulate a reapproachment process without involvement in any specific proposal, in the spirit of Section 23 (2).[5] The decree for judicial separation is valid, even if no effort was made by the Court for reconciliation between the party.[6]

Under Section 23 (3) the Court for the purpose of reconciliation can refer the matter to a third party named by the parties to the proceeding or named by the Court. It is open to the Court while disposing of the proceedings under the Act to have due regard to the reconciliation proceedings and the conduct of the parties therein.[7]

The Court will in a husband's petition in the first instance, satisfy itself whether the petition is *bona fide* and is not a device to avoid payment of maintenance which the wife was getting.[8] A pre-nuptial agreement by the husband

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1. 1962 Jab LJ 442 : 1962 MPLJ 617.
2. AIR 1963 Mys 3 : 40 Mys LJ 411.
3. (1964) 66 Punj LR 620.
4. *Trilok Singh* v. *Smt. Savitri Devi*, AIR 1972 All 52.
5. 1971 Ket LJ 654 : 1971 Ker LR 501.
6. *Raj Rani* v. *Harbans Singh Chhabra*, AIR 1972 Pat 392.
7. *Rameshchandra* v. *Premlata*, AIR 1979 MP 15.
8. *Sushil Kumar* v. *Prem Kumari*, AIR 1976 Delhi 321; *B. B. Syal*, AIR 1958 Punj 489; *Joginder Kaur* v. *Shivcharan Singh*, AIR 1965 J & K 95; *Lacey* v. *Lacey*, (1931) 146 LT 48.

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to live at the wife's place is however, no bar to the husband insisting on the wife living with him wherever he decides to reside.[1] The petitioner cannot, however, succeed merely because the respondent's defences have not been established.[2] The petitioner cannot take advantage of the weakness of the defence set up.[3] In defence to a petition for judicial separation on the ground of desertion, it is open to the respondent to plead and prove that the desertion was really on the part of the petitioner in hat he or she by his or her conduct made it impossible for the respondent to lead the family life and therefore she was forced and entitled to live away.[4] In such a case, if the Court comes to the conclusion that the party really guilty is the petitioner, the petition has to be dismissed. Where the cruelty alleged is not bodily injury of threat of such injury, but conduct, words and actions which tell upon the mind involving the risk to the petitioner's health, the evidence of such words or conduct should ordinarily not be confined to the evidence of the petitioner but has to be corroborated by the testimony of independent witness of either relations or friends or neighbours.[5] Adultery can be proved also by the admission of the party,[6] and by the absence of access for sexual intercourse for longer than the period of generation of the child delivered by wife,[7] and by the husband infecting the wife with gonorrhoea,[8] and venereal disease.[9] In judging the evidence it should not be forgotten that the quality of the evidence and not the quantity has to be considered having regard to the usual reluctance on the part of the neighbours to come forward to give evidence in such cases.[10]

18. Pre-marital pregnancy.—It is for the petitioner-husband who seeks annulment of the marriage on the ground of pre-marital pregnancy of the wife to establish that all the requirements of Section 12 (1) (d) and Section 12 (2) (b) are satisfied.[11] If the pregnancy is sufficiently advanced so that anybody who has an eye can discover it, it does not lie in the month of the husband to state that he was not aware of it at the time of the marriage. It is for the petitioner to show that the respondent was pregnant by some one else at the time of marriage.[12]

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1. *Pothuraju* v. *Radha*, AIR 1965 AP 407 ; *Jagjit Kaur* v. *Ekam Singh*. AIR 1973 P & H 355.
2. *Rebarani* v. *Ashit*, AIR 1965 Cal 62.
3. *Kanna* v. *Krishnaswami*, AIR 1972 Mad 247 at p. 249 ; *Kaushaliya* v. *Lal Chand*, AIR 1972 Raj 253, 255 ; *Rebarani* v. *Ashit*, AIR 1965 Cal 62 ; *Sadhu Singh* v. *Jagadish Kaur*, AIR 1969 Punj 189 ; *Gurdev Kaur* v. *Sarwan Singh*, AIR 1959 Punj 162 ; *Mango* v. *Prem Chand*, AIR 1962 All 447.
4. *Raj Bari Stri* v. *Rassinga*, AIR 1935 Mad 542 : ILR 58 Mad 684 ; *Leela* v. *Manoharlal*, AIR 1959 MP 349.
5. *Sarah Abraham* v. *Pyli Abraham*, AIR 1959 Ker 95.
6. *Stiphan* v. *Piary*, AIR 1955 Pat 519 ; *Mahel Prabhudas* v. *Shahnibai*, AIR 1958 NLJ (Notes) 56.
7. *Raymond Francis* v. *Rama Jyotiramayi*, ILR (1957) Punj 181.
8. *Promiss Nagla* v. *Mervyn*, AIR 1933 Lah 507.
9. *Edna Hardless* v. *Harold Hardless*, AIR 1933 All 56.
10. *Divyani Kanthilal* v. *Kanthilal*, AIR 1963 Bom 98 : ILR (1962) Bom 706.
11. *Sivaguru* v. *Saroja*, AIR 1960 Mad 216 ; *Savalram* v *Yashodabai*, AIR 1962 Bom 190.
12. *Mahendra* v. *Sushila*, AIR 1965 SC 364 ; *Nishit Kumar* v. *Anjali Biswas*, 71 Cal WN 831 : AIR 1963 Cal 105.

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19. **Clause (4) of Section 23.**—In case of decrees of divorce, the Court passing the decree shall give copies thereof free of cost to each of the parties. If the party concerned does not ask for the certified copy of a decree of divorce as contemplated by sub-section (4) of Section 23 of the Act, non-furnishing of the same free of cost by the Court does not save him or her from the applicability of law of limitation prescribed for filing the appeal under Section 28 (4) of the Act.[1]

[2][**23-A. Relief for respondent in divorce and other proceedings.**—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground ; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.]

SYNOPSIS

1. General.
2. Suit for restitution of conjugal rights—Counter-claim for decree of divorce—Rejection of counter-claim.

1. **General.**—This section empowers the Court in any proceeding for divorce, or judicial separation or restitution of conjugal rights to give relief to the respondent opposing the proceeding on the ground of the petitioner's adultery, cruelty or desertion and making a counter-claim on any of these grounds. The Court will grant relief to the respondent to which he would have been entitled had he filed the petition on any of those grounds. The ground of desertion is a 'legal ground' for the wife to resist a petition of the husband for restitution of conjugal rights under Section 9. Though under Section 23 of the Act, the wife has option to lodge counter-claim and press for judicial separation on the ground of desertion The fact that she did not lodge the counter-claim, would not disable her from resisting husband's petition for restitution of conjugal rights on the ground of desertion. The 'legal grounds' include grounds available for maintenance under Section 18 of Hindu Adoptions and Maintenance Act, 1956. Even those grounds are not exhaustive.

2. **Suit for restitution of conjugal rights—Counter-claim for decree of divorce—Rejection of counter-claim.**—Where the husband has filed in the High Court an application under Section 23-A of the Hindu Marriage Act, 1955 making a counter-claim and praying that he may be granted a decree of divorce under Section 13 (1) (ib) of the Hindu Marriage Act dissolving his marriage with the wife. It may be pointed out that in the trial Court the husband did not make such a counter-claim under Section 23-A of the Act. Further the husband has not proved that the wife had deserted him. On the other hand, without reasonable excuse the husband had withdrawn from her company and she was entitled to a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Therefore, the husband's petition for leave to make a counter-claim against the wife was rejected.[3]

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1. Smt. Surjit Kumar v. Shri Tarsam Singh, (1977) 79 Punj LR 667.
2. Ins. by Act No. 68 of 1976.
3. Smt. Sandhya Bhattacharjee v. Gopinath Bhattacharjee, AIR 1983 Cal 161 at p. 165.

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24. Maintenance pendente lite and expenses of proceedings.—Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

SYNOPSIS

1. Applicability, scope and object of the section.
2. Sections 23 and 24—Comparison.
3. Whether a husband can apply for interim maintenance.
4. Maintenance can be granted to the child howsoever labelled the petition may be.
5. Independent income.
6. Fixing maintenance—Factors to be considered.
7. Quantum of maintenance.
8. Date of awarding interim maintenance.
9. Stay of proceedings.
10. Lump sum payment under Section 125, Cr. P. C.—Whether petition can also be filed under Section 24 of the Act.
11. Powers and duties of the Court.
12. "Proceedings under the Act".
13. Affidavits.
14. Appeal.
15. Step for prosecution of appeal.

1. **Applicability, scope and object of the section.**—It appears from a bare perusal of the provisions of Section 24 of the Act that the provisions has been made in order to provide means to the spouse who has no independent source of income to contest a matrimonial proceeding. The indigen spouse should be allowed to obtain the requisite maintenance and litigation expenses from the other party, soon after the filing of the application under Section 24 of the Act, in order that the indigent spouse could maintain herself during the pendency of the proceedings, and also incur the legitimate expenses for contesting the matrimonial dispute. If the proceedings under Section 24 of the Act are allowed to linger on and are unreasonably delayed on account of the dilatory tactics adopted by the other party or on account of lack of vigilance or prompt action on the part of the trial court, then the very purpose of inserting the provisions of Section 24 in the Act would be defeated. The indigent spouse might have provided herself with the requisite means to fight out the matrimonial cause in some other way, but she is entitled to reimburse herself or to repay the debt taken from others, if she has raised the money from others. Undoubtedly, the expression "where in any proceeding" with which Section 24 begins leads to the conclusion that the order granting interim maintenance and litigation expenses should be passed during the pendency of the proceedings in the main petition.

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Thus it needs to be emphasised that the court dealing with a matrimonial case for divorce or judicial separation or restitution of conjugal rights or any other proceedings under the Act, where the respondent spouse has a right to claim interim maintenance and litigation expenses under Section 24, on the ground that he or she has no independent income sufficient for support and the necessary expenses for the proceedings and an application under Section 24 of the Act is moved during the pendency of the proceedings under the Act, then it is the bounden duty of the court to decide the application for interim maintenance and litigation expenses as expeditiously as possible befoire the trial of the main petition begins and at any rate definitely before the decision of the main petition. The proceedings in respect of an application under Section 24 of the Act should not be frequently adjourned and deferred for some reason or the other or without any reason until the trial of the main petition comes to an end, as the principal object for which interim alimony has to be granted would itself be frustrated if the respondent spouse is not put into possession of the necessary funds for maintaining litigation soon after the application under Section 24 is moved. That is why Section 24 speaks of "it appears to the court" instead of providing that "it is proved before the court" and as such Section 24 application can be and should ordinarily be disposed of on the basis of affidavits produced by and on behalf of the parties.

The indigent wife could not be allowed to be deprived of her legitimate right of obtaining interim alimony and expenses of litigation, merely at the whim of the court or on account of the indiscretion exercised by the Court.[1]

The proceedings under Section 24 of the Act have an important bearing with regard to the rights of the defending spouse. Not only the provisions of Section 24 of the Act permit grant of maintenance *pendente lite*, but also it permits the Court to make an order with regard to necessary expenses of the proceedings. In a given case without provision for the necessary expenses of the proceedings, it would be impracticable to insist upon the defending spouse even to file a writ statement. The trial Court, which was moved by filing the application, was bound to decide the application with regard to the maintenance and the expenses. There is, thus, obvious failure to follow the provisions of Section 24 of the Act, and that should be enough to set aside the judgment under appeal and remit the matter back to the trial Court directing it to consider the applicantion.

Decrees of the kind sought by the spouses cannot be made as of course. The same should be made only on the basis of adequate material placed by the party seeking a decree. That was more so when the charges are serious enough like that of the mental disorder of the spouse and of fraud. It is obvious that by mere statements in affidavit, which may in a given case deserve acceptance the factum of the mental disorder of the given person cannot be found out. The material like the one having reference of the other persons who had ordinarily occasions to be in the company of such person, which should be available, should ordinarily be insisted upon. It is significant that though in the present case the plea was that of mental disorder, no other material in that regard was either tendered or insisted upon. An affidavit of the husband is nothing but the recitals of the allegations can hardly be treated as adequate.

It is evident from the trial Court judgment that the matter was decided only on the basis of the affidavit so as to accept the plea of the unsoundness of mind of the wife. Such acceptance of the affidavit does not further the

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1. *Bhanwar Lal v. Smt. Komla Devi*, AIR 1983 Raj 229 at pp. 235 to 237 : 1983 Raj LW 14 : 1983 Raj LR 640 ; (1983) 2 DMC 144.

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requirements of law. The Court should have in such matters, sought corroborative or other direct evidence with regard to the allegation of the unsoundness of mind of the wife. If the wife was really affected by the mental disease and was not in a position to take care of herself, it is indeed difficult to understand as to how the matter at all was proceeded with without there being an effort to appoint a guardian for such a person. The entire matter appears to have proceeded on assumptions and is clearly affected by the technical approach. It is difficult to sanction such a course of enquiry in the matters arising under the statutes concerning the marriage and the decree of the kind as was sought in the instant case.[1]

A wife is not precluded from claiming maintenance under Section 24 notwithstanding that she had preferred a suit for regular maintenance under Section 18 of the Hindu Adoptions and Maintenance Act.[2] The right to relief under Section 24 of the Hindu Marriage Act is not dependent either on the merits of the main petition or on the decision of any particular issue or upon the ultimate success or failure of the main petition.[3] The *reason'd entre* is that when the marriage is admitted it is the duty of the affluent spouse to maintain the indigent spouse. The exercise of power under Section 24 is not dependent on the defence raised on behalf of the opposite party.[4] The enquiry contemplated under the section is summary in nature and the Court has to decide on *prima facie* materials without embarking upon a very elaborate and exhaustive investigation.[5] The object behind the section is to provide financial assistance to the indigent spouse to maintain herself (or himself) during the pendency of the proceedings and also to have sufficient funds to carry on the litigation so that the spouse does not unduly suffer in the conduct of the case for want of funds.[6] The expression "during the proceedings" in Section 24 would confer the proceedings from the start till the end or at least from the date the application is made till the termination of the proceedings in the Court.[7] No interim alimony and litigation expenses can be granted after termination of the proceedings.[8] A pre-existing order under the Criminal Procedure Code for payment of maintenance does not oust the jurisdiction of the Court to allow maintenance.[9] An application under Section 488, Criminal Procedure Code of 1898 is not a proceeding under the Hindu Marriage Act and Section 24 cannot apply.[10] Before interim maintenance is ordered the Court should be satisfied that the petitioner for such interim maintenance has no independent income sufficient for his or her support and the necessary expenses of the

1. *Meena Deshpande* v. *Prakash Shriniwas Deshpande*, AIR 1983 Bom 409 at p. 411.
2. *Simhachalam* v. *Papamma*, (1972) Andh LT 242 : AIR 1973 AP 31.
3. *Surendra Kumar* v. *Kamlesh*, AIR 1974 All 110 ; *Sarirekha Dei* v. *Murli Dhar Subudhi*, 1973 (2) CWR 1304.
4. *Arti* v. *Kunwar Pal*, AIR 1977 Delhi 76.
5. *Sarirekha Dei* v. *Murli Dhar Subudhi*, supra.
6. *Chitralekha* v. *Ranjit Rai*, AIR 1977 Delhi 176 ; *Suseelamma* v. *Raghunadha Reddy*, (1977) 2 Andh WR 98 ; *Arti* v. *Kunwar Pal*, AIR 1977 Delhi 76.
7. *Sarita* v. *Captain Arvind Kumar Mehta*, (1978) 80 Punj LR 213 ; *Kamla Rani* v. *Raj Kumar*, 1971 Cur LJ 512 : 73 Punj LR 912 ; *Nirmala Devi* v. *Ram Dass*, AIR 1973 Punj 48.
8. *Chitralekha* v. *Ranjit Rai*, AIR 1977 Delhi 176.
9. *Satish* v. *Surjit Singh*, AIR 1977 P & H 383.
10. *Daya* v. *Sohan Lal*, 78 Punj LR 226.

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proceeding. It is to be observed that the petitioner for the interim relief need not be the petitioner in the main petition and may be the respondent in the main petition.[1] Two things must be established before the petition can be ordered. The fact that out of sympathy for the petitioner's lot some relation or friend of the petitioner is paying the maintenance would not make it independent income. The independent income here means his or her own income from his or her own property or by his or her occupation or service at the time. Besides, if he or she gets some income, he or she must further show that such income as he or she is getting is not sufficient for his or her maintenance and the expenses of conducting the petition. The only consideration that should enter the judicial mind in an application under this section is whether the applicant is possessed of sufficient means or not for the support of the applicant and the necessary expenses of the proceeding.[2] An order under this section is appelable under Section 28 of the Act.[3] No revision will however lie.[4] Maintenance can be ordered from the date of service of the notice in a proceeding started by the husband for divorce.[5]

The words "during the proceeding" in Section 24 mean a proceeding arising out of the Act and pending in the Court. An appeal pending in the appellate Court is a proceeding under the Act and maintenance allowance can therefore be granted from the date of filing of the appeal and not from the date of the filing of the application for maintenance.[6] If relief under Section 24 can be granted in an appeal from a decree or order passed under the Act, it can also be granted in a revision under Section 15, Civil Procedure Code against an order passed in a proceeding under the Act.[7] It has been held,[8] that the words 'wife or husband' should not be interpreted in a strict and literal sense as to rule out maintenance for the benefit of dependent children living with the wife. By the every nature of the circumstances the requirement of the wife will include the requirement of minor children living with her and depending on her. Though the word used in Section 24 is "may" it would be only in extraordinary circumstances that a Court would refuse to grant an application under that provision, if the conditions precedent for the grant of

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1. *Rajkumari* v. *Trilok*, AIR 1959 All 628 ; *Gopendranath Basu* v. *Smt. Prativa Rani*, 66 CWN 388.

2. *Saraswathi* v. *Krishnamurthi*, AIR 1960 AP 30.

3. *Sobhana Senn* v. *Amarkanta*, AIR 1959 Cal 455 ; see also *Parasuram Rao* v. *Prabha* (1974) 1 Karn LJ 265 ; *Madhukar* v. *Malti*, ILR (1973) Bom 1003 : AIR 1973 Bom 141 ; *Nirmala Devi* v. *Ram Dass*, AIR 1973 Punj 48 ; *Sarla Devi* v. *Balwanta Singh*, AIR 1969 All 601 ; *Kutumba Rao* v. *Sesharatanamba*, AIR 1967 AP 323 (FB) ; *Jairat* v. *Jairat*, AIR 1967 Punj 148 ; *Nehalata* v. *Jagdish*, AIR 1964 Orissa 122 ; *Rukmanibai* v. *Kishenlal*, AIR 1959 MP 187.

4. *Suresh Prasad* v. *Manorama Devi*, AIR 1973 Pat 321.

5. *Sobhana Senn* v. *Amarkanta*, AIR 1959 Cal 455.

6. *Mahabir Prasad Jain* v. *Smt. Pushpamala*, 1970 All LJ 1406 ; see also *Mukan Kumar* v. *Ajit Chand*, AIR 1961 Raj 51 ; *Annapurnamma* v. *Ramakrishna*, (1958) 2 Andh WR 382.

7. *Surendra Kumar* v. *Kamlesh*, AIR 1974 All 110.

8. *Damodar* v. *Binda*, (1974) 76 Punj LR (D) 33 ; *Bibi Balbir Kaur* v. *Raghubir Singh*, AIR 1974 Punj 225 ; *Apparao* v. *Paradasamma*, (1974) 2 Andh WR 359 : (1974) 2 APLJ 159.

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such allowance are fully satisfied.[1] The conduct of either party is immaterial and irrelevant in regard to awarding maintenance *pendente lite*.[2] Though there are no words specifically stating that an application under Section 24 has to be disposed of prior to the main petition, it is clear that the application under the section is intended to be disposed of in the first instance during the pendency of the main petition. It is not open to the Court to take on the application to the main petition itself.[3] When the trial Court postpones orders on the application until the final issue is decided, the High Court as the Court of appeal can award maintenance and litigation expenses.[4] Section 24 vests a wide discretion in the Court enabling it to modify, vary or suspend an order of maintenance on account of change in circumstances.[5] Section 24 does not in terms provide for discontinuance of the monthly allowance granted under the section but the Court which is seized of the matter has always the power to so act as to do justice between the parties and vary its earliest order in the light of the charged circumstances of a given case.[6]

The suspension of an order of maintenance *pendente lite* on the indigent wife not producing any evidence only means that the order is put in inactivity and on the cessation of suspension it will revive with its full vigour without any further orders. The object of the suspension was to prompt the wife to lead her evidence expeditiously and for that purpose a penalty was imposed which consisted of deferring of punctual payment of the monthly allowance of maintenance which itself entails severe hardship.[7] An order fixing maintenance and litigation expenses without stating either the facts or the grounds on which it was passed is not proper or legal.[8] Where the order is not supported by any reason and does not discuss the *pros* and *cons* of the rival versions of the parties relating to the quantum of the husband's income it is liable to be set aside.[9] In proceedings under Section 24, no maintenance as such would be awarded for a period subsequent to the disposal of the petition.[10] An order made under Section 488 (now Section 125) of the Criminal Procedure Code cannot be cancelled merely because interim maintenance has been granted under Section 24, Hindu Marriage Act. That must necessarily await the final disposal of the main petition for matrimonial relief.[11]

The terms "respondent" and "petitioner" in the section refer respectively to the respondent and petitioner in the interlocutory application and not to the respondent or petitioner to the main or substantive application.[12] An

1. *Usha* v. *Suahir Kumar*, (1974) 76 Punj LR 195.
2. *Lallubhai* v. *Nirmalaben*, ILR (1971) Guj 1183 : AIR 1972 Guj 174.
3. *Mythili Raman* v. *Capt. K. T. Raman*, (1976) 1 MLJ 399 : 89 LW 264 : AIR 1976 Mad 260 ; *Arti* v. *Kunwar Pal*, AIR 1977 Delhi 76 ; *Chhaganlal* v. *Sakku Devi*, AIR 1975 Raj 8.
4. *Arti* v. *Kunwar Pal*, AIR 1977 Delhi 76.
5. *Anuradha* v. *Santosh*, AIR 1976 Delhi 246 ; *Devki* v. *Purushottam*, AIR 1973 Raj 2.
6. *Kamla Rani* v. *Raj Kumar*, 73 Punj LR 912.
7. *Anuradha* v. *Santosh*, AIR 1976 Delhi 246.
8. *Shakuntala* v. *Amarnath*, AIR 1978 P & H 32.
9. *Satish* v. *Surjit Singh*, (1977) 79 Punj LR 384 : AIR 1977 P & H 383.
10. *Swarajyawati* v. *Munnalal*, (1971) 2 Andh WR 351.
11. *Ibid.*
12. *Rukmani Bai* v. *Kishan Lal*, AIR 1959 MP 187; *Rajkumar* v. *Trilok Singh*, AIR 1959 All 628.

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application under the section can be made by a spouse who may be either the petitioner or the respondent to the main petition for any of the matrimonial reliefs.[1] An order staying further proceedings in the substantive petition for matrimonial relief will not affect the operation of an order passed under Section 24.[2] Nor will the withdrawal of the substantive petition absolve the husband of his liability to the wife to pay her the interim maintenance that had been ordered under Section 24 and due to her will the date of such withdrawal.[3] Arrears from the date of the main petition can be ordered though the application under Section 24 was made only later.[4] The making of an order under Section 24 is one of discretion with the Court, a discretion which is judicial and has to be exercised on sound principles of matrimonial law.[5] In exercising its direction it would be open to the Court to award interim maintenance from the date of demand for the same, by serving a notice on the other side after institution of the proceeding and not from the date of the application.[6] According to English decisions, alimony *pendente lite* may be granted by the Court in the exercise of its discretion even where in the pending petition the jurisdiction of the Court is questioned,[7] or the very validity of the marrage is challenged.[8] Section 24 places the husband and wife on the same footing and makes it possible to grant the relief against the wife also.[9] In case of non-compliance with an order directing payment of maintenance *pendente lite* and expenses of the proceedings, the Court has got the power to stay the matrimonial action for the purpose of carrying out the order.[10] There is nothing in the scheme of the Act prohibiting such stay.[11] If the wife has obtained a decree for restitution of conjugal rights and the husband has appealed, the wife can execute the decree and if the husband seeks stay pending appeal, he may be asked to pay up all the amounts due and the Court can avail of the provisions of Order 41, Rules 5 and 6 of the Civil Procedure Code.[12] It would be in the interest of justice to dismiss the appeal itself for non-compliance with the order.[13] The main sanction behind an order for payment of interim maintenance and litigation expenses is that in case of non-compliance, the defaulting party can be debarred from prosecuting or defending the proceedings.[14] The Gujarat High Court is of the view that the Court

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1. *Krishna* v. *Thailambal*, (1969) 1 MLJ 328.
2. *Balasubramanian* v. *Saroja*, 68 Punj LR 121.
3. *Ibid* ; See also *Krishan* v. *Thailambal*, (1969) 1 MLJ 328.
4. *Sabir* v. *Sujata*, 70 Cal WN 633.
5. *Mukand Kumar* v. *Ajit Chand*, AIR 1961 Raj 51 ; *Mahalingam* v. *Amsavlti*, (1956) 2 MLJ 289.
6. *Sobhana* v. *Amara Kanta*, AIR 1959 Cal 316 ; *Pratima* v. *Kamal Kumar*, (1964) 68 Cal WN 316.
7. *Johnstone* v. *Johnstone*, (1929) P. 165 ; *Smith* v. *Smith*, (1923) P. 128.
8. *Foden* v. *Foden*, (1894) P. 307; *Blackmore* v. *Mills*, (1868) 18 LT 586; *Ravi Kumar* v. *Nirmal Devi*, (1978) 80 Punj. LR 561.
9. *Nanjappa* v. *Vimala Devi*, AIR 1957 Mys. 44.
10. *Bhuvneshwar Prasad* v. *Dropta Bai*, AIR 1963 MP 259 ; *Ramachandra Rao* v. *Kausalaya*, AIR 1969 Mys 76 ; *Yakub* v. *Krishna*, AIR 1961 All 93.
11. *Madhuben* v. *Mahendra*, (1976) 17 CLR 422.
12. *Ibid*.
13. *Ram Swaroop* v. *Janak*, AIR 1973 Punj 40.
14. *Nirmala Devi* v. *Ram Dass*, AIR 1973 Punj 48.

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cannot dismiss a proceeding,[1] or order the defence to be struck off.[2] The application by wife for interim maintenance for her and her child in pending divorce proceedings against her. The maintenance cannot be avoided to the child as it is not within the purview of Section 24.[3] The Court may fix the amount of permanent alimony and maintenance under this section including expenses of the proceedings which the respondent was forced to face.[4] The fact that wife can go and live with her father does not mean that she cannot claim maintenance against husband. What is to consider under this section is her own income.[5] The divorce petition pending for a long time is no ground for directing husband to pay large sum as arrears of maintenance *pendente lite*. If the education and maintenance of all children was properly looked after by husband, the wife cannot claim for the same pending the petition. The provision for education, maintenance and custody can be ordered by the Court under Section 24.[6]

After the amendment of 1976 appeal lies, in the case of orders only if they are orders made under Section 25 or 26. However, even under these sections, if any interim order is made : it is not appealable, no appeal lies against orders made under any other section of the Act for right of appeal must be conferred by Act. Interim order passed under Section 26 would be obviously similar to the one made under Section 24 in relation to the wife or husband. The Court may pass interim orders with regards to maintenance and education of the minor children. However, interim maintenance cannot be granted for the period anterior. The term "during" implies the period intervening the commencement and termination of the proceeding. The marginal note cannot govern the express provision of the Act, but where the words of the Act are susceptible of more than one meaning or are ambiguous the marginal note can be certainly taken into account provided the marginal note was part of the Bill which was presented to the Parliament for its consideration and was passed into an Act. The amount of maintenance that may be granted even by way of support cannot be determined solely with reference to the number of persons that have to be maintained from out of the income available.[7] Section 26 empowers the Court to provide for maintenance of only minor children, and maintenance cannot be granted to adult children *pendente lite*. The proper recourse for them is to seek maintenance under Section 20 of Hindu Adoptions and Maintenance Act, 1956.[8] The child of litigating spouses are not entitled to interim maintenance. The words "during the proceedings" connote the period from the commencement till the conclusion of the proceeding, i. e. from the date on which issues are framed till the disposal of the case, and interim maintenance cannot be granted from the date of filing of the proceeding.[9] Generally the petitions under Section 24 and 26 are decided first and should as a matter of fact be decided before conclusion of the main petition. A reading of Sections 24 and 26 does not show that if the main

1. *Manilal v. Jasumatiben*, (1964) 5 Guj LR 407.
2. *Prahladbhai* v. *Ashabai*, (1964) 5 Guj LR 417 ; *Prithivirajsinghji* v. *Shivaprabha Kumari*, AIR 1960 Bom 315 ; *Mahalingam* v. *Amsavobli*, (1956) 2 MLJ 296.
3. *Purushottam Dass* v. *Smt. Pushpa Ben*, AIR 1982 Orissa 270.
4. *Pramod Yashwant Chavan* v. *Sunita Pramod*, 1977 UCR (Bom) 452.
5. *C. B. Joshi* v. *Ganga Devi*, AIR 1980 All 1:0.
6. *Ivan Erasmus* v. *Mrs. Sena Erasmus*, AIR 1982 All 194.
7. *Narendra Kumar Mehta* v. *Smt. Suraj Mehta*, AIR 1982 AP 160.
8. *Kartarchand Jain* v. *Smt. Taravati Jain*, AIR 1982 Bom 15.
9. *Puranchand* v. *Mst. Kamla Devi*, AIR 1981 J. & K. 5.

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petition under Sections 9, 10, 12 or 13 is disposed of, the jurisdiction of the Court to award maintenance *pendente lite* by an order to be passed thereafter is not taken away. The wife's main petition allowed on concession made by husband and her application under Section 24 was decided atterwards, the maintenance *pendente lite* for herself and her child can be granted from the date of filing petition under Section 24 till its conclusion.[1] In a divorce petition application under Section 24 for interim maintenance and expenses, if orders by the Court *pendente lite*, is not appealable but revision lies. Though Section 24 in terms refers only to the wife or husband making an application, the Court has got power under Section 26 to make interim order in respect of maintenance of minor children also.[2] The application by respondent-wife for maintenance *pendente lite* and expenses of proceedings when duly supported by affidavit, the Court cannot order requiring the wife to file written statement without deciding application is illegal.[3] The comma occurring after the words "the expenses of the proceeding" in Section 24, is not disjunctive and does denote the legislative intent that the husband must pay expenses of the proceeding even of not possessed of sufficient means and the punctuations cannot control the plain meaning of the text.[4] In the same case their Lordships have held that to refuse claim of maintenance *pendente lite* and litigation expenses applied by the wife in divorce proceedings against her on a plea that she is guilty of a matrimonial offence would amount to pre-judging the main issue and is also contrary to the objection of Section 24. A wife found living an unchaste life is not entitled to the grant of maintenance *pendente lite* and litigation expenses.[5] Under Section 24 maintenance can be granted during the proceeding in favour of the husband or wife as the case may be but not in favour of a child born out of the wedlock of the parties.[6] The mere denial of relation by husband is not sufficient to oust the jurisdiction of the Court under Section 24.[7]

The wife is entitled to claim interim maintenance pending hearing of the appeal.[8] The application for grant of interim alimony must be decided as soon as the puestion is raised.[9] Defence can not be struck off on failure to pay interim maintenance as ordered by the Court.[10]

2. Section 23 and Section 24—Comparison.—It cannot be said that the words used in Section 23 (2) i.e. before proceeding to grant any relief under this Act" will cover the summary proceeding under Section 24. If the provisions of Sections 23 and 24 are read harmoniously it is more than clear that the expression used in Section 24, i. e. 'where in any proceeding under this Act' makes it clear beyond doubt that an application for maintenance *pendente lite*

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1. *Sudarshan Kumar* v. *Smt. Deepak*, AIR 1981 P. & H. 305.
2. *Smt. Suhasini* v. *B. R. Umakant*, AIR 1981 Kant 115.
3. *Smt. Anjula* v. *Milan Kumar*, AIR 1981 All 178.
4. *Smt. Gangu Pundalik Waghmare* v. *Pundalik Maruti Waghmare*, 1979 Mh LJ 555 : AIR 1979 Bom 264.
5. *Jeevan Lata* v. *Krishnan Kumar*, (1979) 81 Punj LR 426 ; See also *Yogeshwar Prasad* v. *Jyoti Rani*, AIR 1981 Delhi 99.
6. *Puranchand* v. *Kamla Devi*, AIR 1981 J & K 5.
7. *Nemi Chand Jain* v. *Smt. Lila Jain*, AIR 1968 Cal 405.
8. *Arya Kumar* v. *Smt. Ila Bai*, AIR 1968 Cal. 276.
9. *Meera Bai* v. *Lal Chand*, 1961 MLJ (Note) 77.
10. *Prithviraj* v. *Bai Shivprabha*, AIR 1960 Bom 315 : 1960 NLJ 92.

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and expenses of the proceedings could be filed even before the procedure prescribed under Section 23 (2) is followed. If it is construed that the order under Section 24 for maint nance *pendente lite* cannot be passed unless the procedure prescribed by sub-sections (2) and (3) of Section 23 is followed then the very purpose and object of Section 24 will be frustrated.

Even otherwise an order passed under Section 24 of the Act could not be termed as illegal only because the court did not make any endeavour to bring about a reconciliation between the parties. The provisions of Section 23 (2) are not absolute in nature. While casting a duty upon the court to make every endeavour to bring about reconciliation between the parties a discretion is left to the court, by the use of the qualifying phrase, 'where it is possible to do consistently with the nature and circumstances of the case'.[1]

3. Whether a husband can apply for interim maintenance.—Though interim maintenance during the pendency of a matrimonial cause is usually made payable by the husband to the wife, this section enables the husband also to apply for the interim relief, in appropriate cases. The word 'respondent' in the section means the respondent to the application for maintenance and refers to the opposite party in that application.[2] A poor man might have married a rich wife and the wife may file a petition for any of the reliefs provided by the Act, namely, restitution of conjugal rights, judicial separation, nullity decree or divorce. The husband not being a man of means may not be possessed of sufficient funds to meet his maintenance and the cost of conducting the defence which he may have thereto. In such circumstances, it is open to the Court on a petition by the husband setting out the circumstances justifying an order for interim relief to him to direct the wife to pay maintenance and the cost of the defence of the husband. The amount of the cost and the maintenance must depend necessarily upon the means of the parties, the nature of the case and the defence and the incidental expenses that have to be incurred for the efficient conduct of the proceeding. The husband may be entitled to apply for this interim relief when he happens to be the petitioner in the main petition. If in the above case the wife leaves the husband and is living in adultery with another and the husband has to file a petition for dissolution of the marriage by a decree of divorce and he applies for the interim maintenance and the cost of litigation, he can be granted the relief under this section if he satisfies the Court that he has no independent means sufficient for his support and the necessary expenses of the proceeding. It is a *fortiori* when the petitioner for interim relief is the wife, be she the petitioner or be she the respondent in the main petition based on the matrimonial offence.

4. Maintenance can be granted to the child howsoever labelled the petition mey be.—The provisions contained in Sections 24 and 26 are beneficial provisions and literal interpretation would be unsound ; and that on an application claiming maintenance for the husband or the wife, as the case may be, and for the child, maintenance can be granted to the child howsoever labelled the petition may be. The substance matters, not the form. If there be authority under the provisions, there is end of the matter.[3]

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1. *Dilipbhai Chhaganlal Patel* v. *State of Maharashtra and another*, AIR 1983 Bom 128 at p. 130.
2. *Rukmani Bai* v. *Kishanlal*, AIR 1959 MP 187 ; *Rajkumari* v. *Trilok Singh*, AIR 1959 All 628.
3. *Mahendra Kumar Mishra* v. *Smt. Snehlata Kar*, (1983) 1 Civi LJ 254 at p. 258 : AIR 1983 Orissa 74 : 1982 East LR 437.

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5. Independent income.—The expression "independent income" has not the meaning of regular receipt of money periodically from a given source as the expression "income", is issued in the Income-tax Act. It merely means the wherewithal or funds or assets from which the maintenance and the costs can be met. Hence the use of the expression income is unfortunate and the expression "means" may well have been used instead of the word "income". It surely could not have been the intention of the legislature that a party who has large assets by way of landed property or palatial house or a big hord of money none of which yields any rent or interest but which can easily be converted to meet the expenses of the maintenance and expenses of the proceeding can be permitted to apply for interim maintenance and the cost against the respondent who has no property but is getting some salary which may leave some small margin of surplus after meeting the maintenance and the cost of litigation. Nor does the section mean that if the respondent to the interim maintenance has plenty of property but no income is received by him or her, he or she cannot be ordered to pay the interim maintenance and costs to the other spouse who is without the means to meet those expenses. If both the parties have the means to conduct litigation and meet their expenses of maintenance no order for interim maintenance can be awarded. So also if each of them is without means or income or at any rate possessed only of sufficient means which would leave no margin of surplus after meeting his or her own maintenance and the expenses of the petition, then also no order for this interim relief can be passed.[1] 'Independent income' means net income after deducting compulsory outgoing like income-tax, provident fund contribution, etc.[2] and in considering the means of the wife, possession of ordinary jewellery and household movables like utensils and furniture ought not to be taken into account.[3] In *Radika Bai* v. *Sadhu Ram*,[4] it was held that the goodwill or charity to earn something or possession of jewels which she could convert into cash and these would not be a proper ground for refusing her the funds necessary for ber carrying on the litigation. In considering this question of means of the applicant, the circumstance that the applicant is being supported by an adulterer and that the respondent has not sufficient means would be a proper ground for depriving the applicant of the benefit of this section. If the Court comes to the concluston that even if she, the applicant has no income but she has the support of her parents or such others, the Court may award a nominal monthly amount towards maintenance.[5] But if the Court comes to the conclusion that the applicant is entitled to *pendente lite* maintenance, the quantum may be fixed at one-sixth of the net income of the respondent.[6] The maintenance *pendenee lite* cannot escaped of by the person who is working with father's farm. The words "independent income" are applicable at the time in the application for claiming maintenance is claimed and not subsequently at the time when same is to be granted. Even while a person is working with his own family members and relations, it could be said that he is having no income as such within the meaning of Section 24.[7]

6. Fixing maintenance—Factors to be considered.—Whenever Courts award even interim alimony, social status of the parties, earnings of the husband who has to pay maintenance, liability of the wife, require (sic) of par-

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1. *Preeti* v. *Ravind*, AIR 1979 All 29.
2. *Ibid.*
3. *Kuriakase* v *Kuriakase*, (1958) 1 MLJ 393.
4. AIR 1970 MP 14.
5. *Preeti* v. *Ravind*, AIR 1979 All 29 ; see also *Radhikabai* v. *Sadhuram*, AIR 1970 MP 14 ; *Sivakami* v. *Bangoruswami*, (1954) 2 MLJ 397.
6. *Naukhanna* v. *Ajeet Chand*, AIR 1958 Raj 322.
7. *Gurmail Singh* v. *Bhuchari*, AIR 1980 P & H 120.

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ticular treatment, etc., all are to be considered while awarding interim alimony or even at the time of passing the final order of maintenance.

Section 24, Hindu Marriage Act, 1955 speaks of fixing a reasonable amount, and that reasonableness has to be considered from some of the factors mentioned above and also other factors which may crop up in a peculiar case. Along with that, the Court also should not ignore the legal obligations of the husband to earn and maintain the wife. It should not be forgotten that there may be obligations of the husband to maintain other members of his family, and the Court cannot overlook them even though they may not be legal obligations. Court has also to see whether the wife is earning so that the husband may not be saddled with the expenses and ultimately the Court will pass the order considering all the aforesaid relevant factors. For considering those factors, there cannot be any specific formula which will be available in all cases, but each case will depend on its particular set of circumstances. Therefore, this rule of thumb of 1/5th cannot be applied in all cases and should not be encouraged also.

In the instant case, the trial Judge has not only divided the income of the husband by '5' but from that income he first deducted Rs. 500/- for parents and then divided the remaining amount of Rs. 1,400/- by '5' to arrive at the figure of Rs. 280/- as 1/5th of that amount of Rs. 1,400/-. That was certainly not proper. In *Dinesh Mehta* v. *Smt. Usha Dinesh Mehta*,[1] the total income was Rs. 220/- per month being Rs. 1,500/- of the father of the husband and Rs. 720/- of the husband. The Bombay High Court considered that in the family of the father the husband where he was staying as a member, there were five members, i. e. the father, mother, brother, sister and the husband himself. The wife was staying as a member of the said family till she left or was compelled to leave the same. So, the aforesaid amount was divided by '6' and it was considered that the amount would come to Rs. 370/-, and the amount of Rupees 350/- per month awarded was quite justified. In the instant case, if that rule was applied, (though it was not necessary that it should be applied in all cases, because sometime the family of the husband may be large and the wife may be obliged to take a small share) in such a case that rule also cannot be said to be universally applicable. At any rate, considering the claim of the husband in that case, as stated earlier the family consisted of himself, his wife and parents, i. e. four persons. So, if the income of Rs. 1,900/- is divided by '4' then the wife would be entitled to an amount of Rs. 475/- per month, and this should have been awarded. Now, the wife is getting an amount of Rs. 150/- per month as per the order of the Criminal Court. In this matter she will be entitled to an amount of Rs. 325/- per month as alimony *pendente lite* instead of an amount of Rs. 280/- per month as awarded by the trial Court [2]

Where the husband has the means to pay ; and that the wife and children are entitled to get alimony and expenses as prayed for by them. The social status, age educational and other requirements of the children are all factors to be considered in fixing the quantum of maintenance.[3]

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1. AIR 1979 Bom 173.
2. *Dhirajben Prabhudas Parmar* v. *Rameshchandra Shambhulal Yadav*, AIR 1983 Guj 215 at pp. 216 and 217 : 1983 Guj LH 455 : 1983 (2) Guj LR 860 : 1983 2 DMC 56.
3. *S. Radhakumari* v. *K. M. K. Nair*, AIR 1983 Ker 139 at p. 145.

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7. Quantum of maintenance.—The maintenance means provision for food, clothing and habitation and other necessaries for the support of the wife or the husband. This section deals with temporary alimony which is synonymous with the terms alimony *pendente lite* or alimony *ad interim*. The Act itself has not set any limit to the maintenance awardable under Section 24. The section empowers the Court to award such sum as "it may seem to the Court to be reasonable". What is a reasonable amount must differ from case to case.[1] Neither a minimum nor a maximum percentage of the respondent's income can be fixed for the maintenance allowance. The quantum must depend on the circumstances of the case.[2] No mathematical proportion of the respondent's income is to be awarded.[3] Following the practice under Section 36 of the Divorce Act, some High Courts have held that ordinarily in the absence of special circumstances one-fifth of the net income of the respondent should be allowed.[4] This practice is not warranted and the rule has no place in the Hindu Marriage Act, as Section 24 itself expressly states that the interim maintenance should be a "reasonable" amount.[5]

The Court should consider the means and the income of the parties, the nature of the litigation and allied circumstances and the equities of the parties should be adjusted.[6] Courts should never lose sight of the fact that except in very exceptional cases a Hindu wife never normally leaves the house of her husband and is never enamoured of staying with her parents after giving up the matrimonial home. Thus the consideration of the wife living with her parents is not relevant in determining the quantum.[7] In a recent Bombay case in a family of six members, the husband and his father were earning members earning together Rs. 2,200 per month. Interim maintenance of Rs. 350 per month was awarded to the wife on the basis that the share of each member of the family came to Rs. 370 per month. It was held that the rule of the wife not being entitled to not more than one-fifth of the net income of the husband was not only unreasonable but also irrational and cuts at the root of equality of the wife as an equal partner of the husband.[8] The amount fixed as maintenance of wife under Section 90 (1) Army Act shall be taken to be fixed for maintenance for the purpose of Section 24 of the Hindu Marriage Act.[9] Since this temporary or interim allowance is awarded without going into the merits, the amount is usually less than the amount awarded as permanent maintenance and is normally restricted to the actual needs of the petitioner if living in comfortable retirement, but the amount should not be on a very parsimonious or miserly scale. If the petitioning spouse is sickly and requires medical attention provision should be made for such treatment also.

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1. *Preeti* v. *Ravind*, AIR 1979 All 29.
2. *Ibid.*
3. *Usha* v. *Sudhir Kumar*, 1975 HLR 1 (DB) (P & H).
4. *Sudharsonkumari* v. *Chhagar Singh*, 1978 Kash LJ 1 ; *Mukan Kunwar* v. *Ajeetchand*, AIR 1978 Raj 322 ; *Susheela Devi* v. *Dhani Ram*, AIR 1965 MP 12 ; *Prasanna Kumur* v. *Sureswari*, AIR 1969 Orissa 12 ; see however *Dinesh* v. *Usha*, AIR 1979 Bom 173.
5. *Raghavalu* v. *Bharatamma*, (1975) 2 APLJ 17 ; AIR 1975 Andh LT 357 ; *Preeti* v. *Ravind*, AIR 1979 All 29 ; see also *Pushpa Rani* v. *Asha Nand*, (1975) 80 Punj LR 300 ; *Usha* v. *Sudhir Kumar*, (1974) 76 Punj LR 195.
6. *Preeti* v. *Ravind*, AIR 1979 All 29.
7. *Usha* v. *Sudhir Kumar*, 1975 HLR 1 (DB) (P & H).
8. *Dinesh* v. *Usha*, AIR 1979 Bom 173.
9. *Sarita Mehta* v. *Capt. Arvind Kumar Mehta*, (1978) 80 Punj LR 213.

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If notice goes to the respondent in the petition for interim maintenance and the respondent enters objection, it is permissible for the Court to go into the conduct of the petitioner with reference to the question whether she would be held to have forfeited her claim to the consideration in sympathy of her claim, but such enquiry into the conduct must be of a very summary type on *prima facie* material and should not take the form of a very elaborate and exhaustive investigation of the charges and counter-charges of the spouse which ought to be reserved for the hearing on the main case. No interim maintenance ought to be awarded where the respondent to the petition denies the marriage itself until at any rate the Court tries the issue as to the factum of marriage and finds it as true. The arrears from the date of main case for judicial separation may be granted as maintenance *pendente lite* though application is made later.[1] In the same case it was further held that in awarding maintenance the status of the husband and not father's status is to be considered. In an application under Section 24 the question of condonation cannot be raised. The childless wife is not entitled to add her education expenses in the application under Section 24, and appeal lies against final orders passed under the section. If the lower Court comes to the conclusion as to the quantum of maintenance and expenses without any matrimonial record, the order must be set aside because symphathy cannot take the place of proof.[2] In determining the quantum of maintenance the conduct of the parties is also relevant.[3]

The application for interim maintenance cannot stand in the way of proper order for interim maintenance as the merits of the application for restitution has to be decided on the basis of the evidence to be laid in *Bibi Balbir Kaur Kathuria* v. *Raghubir Singh Kathuria*.[4] The husband earning Rs. 40/- per month and the Court awarded maintenance of Rs. 10/- per month to the wife as nothing more could probably be allowed because it is not the law that husband must starve himself to maintain his wife.[5] The litigation expenses and maintenance *pendente lite* can be allowed to the wife only if husband is in a position to have independent source of income and is in a position to make payments.[6] When a cerain given fact is within the knowledge of one party (husband) and that party (Govt. servant) also had the liability to prove that fact with documentary evidence, if that party does not do so, then it cannot be said that the evidence given by the wife regarding income of her husband is unreliable and is to be a rejected out of hand.[7] If the facts or grounds on which the order for maintenance and litigation maintenance is passed, are not mentioned, then such order is not proper and legal and has to be set aside.[8] The Court can in appropriate cases grant relief of maintenance to woman from estate of her deceased husband even on its finding that marriage is void.[9] The application for *pendente lite* maintenance and/or expenses of the proceedings can be refused in proper cases. The Court can look into conduct and ability

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1. (1966) 70 Cal WN 633.
2. *Bhalu Naik* v. *Hemo Naikani*, AIR 1969 Orissa 236.
3. *Prasanna Kumar Patra* v. *Smt. Sureswari Patrani*, AIR 1969 Orissa 12.
4. AIR 1974 Punj 225.
5. *Smt. Rajdei* v. *Leutan*, AIR 1980 All 109.
6. *Smt. Leela Devi* v. *Tarlok*, (1978) 80 Punj LR 744.
7. *Smt. Pushpa Rani* v. *Shri Asanand*, (1978) 80 Punj LR 3 0.
8. *Shakuntala* v. *Amar Nath*, AIR 1978 P & H 32.
9. *Smt. Rajesh Bai* v. *Smt. Shanta Bai*, AIR 1982 Bom 231.

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of the party.[1] A mere pre-existing order under Cr. P. C. for payment of maintenance does not oust the jurisdiction of the Civil Court to allow maintenance *pendente lite*.[2] The object behind Section 24 is to provide financial assistance to indigent spouse to maintain herself (or himself) during the pendency of the proceedings and also to have sufficient funds to defend or carry on the litigation.[3] In case of impotency of the husband the wife is entitled for maintenance.[4] For determination of the amount of maintenance it should be determined what is the carry home salary of the person concerned, so that a reasonable amount of payment may be determined. At the time of determining the carry home salary, the amounts of deductions should also be taken into consideration. There is no hard and fast rule that the provident fund and life insurance premiums should not be taken into consideration.[5] The husband getting a salary of Rs. 700/- per month then Rs. 150/- awarded as maintenance was not high.[6] The respondent may apply for interim maintenance pending the proceedings at any time after entering appearance to the petition.[7] The fact that the wife did not ask for legal expenses in the lower Court would not preclude her from applying for the same in the Appellate Court.[8]

8. **Date of awarding interim maintenance.**—The interim maintenance should be awarded to the indigent spouse from the date when the application under Section 24 of the Hindu Marriage Act is actually moved. There may be cases where the respondent may not be in justifiable need of interim maintenance during the earlier stages of the matrimonial litigation or may unduly delay the filing of an application under Section 24 for the interim maintenance for several years after the filing of the main petition and in all such cases it would not be proper to award a lump sum amount to the respondent spouse, who has neglected to file an application under Section 24 of the Hindu Marriage Act soon after the service is effected upon her of the notice of the main petition.[9]

In the case of *S. Radhakumari* v. *K. M. K. Nair*,[10] the court directed that the payment of maintenance will be effective from the date of service of summons of the main petition for divorce on the wife.

9. **Stay of the proceedings.** In a petition for restitution of conjugal rights filed by husband, the payment of the interim maintenance to the wife was ordered. The husband made defaults in payments whereupon wife applied for stay of petition, till pending payment of arrears and legal

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1. *Balbir Singh* v. *Smt. Swarn Kanta*, AIR 1981 Raj 266.
2. *Surjit Kaur* v. *Tirath Singh*, (1977) 79 Punj LR 621.
3. *Smt. Chitra* v. *Ranjit Rai*, AIR 1977 Delhi 176.
4. *Siraj Mohmedkhan* v. *Hafizunnisa*, AIR 1981 SC 1972.
5. *Sushma Khanna* v. *Suresh Khanna*, AIR 1982 Delhi 176.
6. *D. P. Gapala* v. *Pushpa Veni*, AIR 1982 Kant 329.
7. *Simhachalam* v. *Papamma*, AIR 1973 AP 33.
8. *Sivakami* v. *Bangaru*, (1954) 2 MLJ 397 ; *Dr. Tarlochan Singh* v. *Smt. Mohinder Kaur*, AIR 1963 Punj 249.
9. *Bhanwarlal* v. *Smt. Kamla Devi*, AIR 1983 Raj 229 at p. 239 : 1983 Raj LW 314 : 1983 Raj LR 640 : (1983) 2 DMC 144.
10. AIR 1983 Ker 139 at p. 143.

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expenses are paid by the husband. Such a plea is not maintainable.[1] Where the Trial Court postpones orders on the application until the final issue is decided, the High Court has jurisdiction as a Court of appeal to award maintenance and litigation expenses.[2] When the Trial Court postpoes orders on the application of the wife under Section 24, till the decision of the issue of the legality of the marriage, it acts illegally. Even to fight out that issue wife is entitled to a decision on her application under Section 24.[3] The mere fact that wife unjustly deserted the husband is not so abomirable as to disentitle her has any maintenance whatsoever.[4] In *Arya Kumar Bal* v. *Smt Ila Bal*,[5] it was held that where there is default in payment of maintenance under this section and the party aggrieved moves the matrimonial Court, that Court can stay proceedings till the order has been complied with.

10. Lump sum payment under Section 125, Cr. P. C.—Whether petition can also be filed under Section 24 of the Act.—Where the wife got a lump sum amount of Rupees 9000/- in execution of the order passed in her favour under Section 125, Cr. P. C. At the time when that amount was paid to her, only a sum of Rs. 6450/- was due to her. But the husband in order to settle the matter finally paid a sum of Rs. 9000/- and got an undertaking from the wife that now she would not claim any type of maintenance etc. against him i. e. her husband. It was on account of that undertaking that the amount which was not even due at that time, was paid to the wife. In view of that undertaking, the wife could not claim separate maintenance under Section 24 of the Act.

In view of that undertaking the wife deprived herself of claiming any maintenance from her husband. In that situation, it becomes immaterial whether now the same was being claimed under Section 24 of the Act. In that view of the matter, the approach of the trial Court that the lump sum payment under a compromise was no bar to reopen the issue at any subsequent stage was wrong and unwarranted.[6]

11. Powers and duties of the Court.—The words 'any proceeding under this Act' includes proceeding in appeal. It is common place that an appeal is a continuation of an original proceeding, and the Appellate Court has jurisdiction to make an interim order in terms of Section 24 of the Act.[7] The Court has to consider only whether the applicant has independent income sufficient to support herself or himself and to meet expenses of the proceedings. The conduct of the parties leading to proceedings, on merits of the case is not relevant consideration.[8] If Section 141 of C P.C. has no application to interlocutory proceedings in suit, Court can issue interrogatories in exercise of its inherent powers under Section 151, C. P. C.[9]

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1. *Suseelamma* v. *Raghunadha Reddy*, (1977) 2 Andh WR 98 : (1977) 1 APLJ 180.
2. *Mrs. R. P. Singh* v. *Lt. Col. Kanwarpal Singh*, AIR 1977 Delhi 76.
3. *Ibid*
4. *N. Varalakshmi* v. *N. V. Hanumantrao*, AIR 1978 AP 6.
5. AIR 1968 Cal 276.
6. *Pritam Singh* v. *Rajinder Kaur*, AIR 1983 P & H 239 at p. 241.
7. AIR 1959 AP 49.
8. 1964 MPLJ (Notes) 185.
9. *Ganga Devi* v. *Krishna Prasad Sharma*, AIR 1967 Orissa 19.

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In a suit by wife for restitution of conjugal rights, the wife applied for maintenance *pendente lite* and defraying the expenses of the proceeding which was rejected solely on the ground that she has already received a consolidated amount to defray the expense is improper. The Court must enquire into the various elements prescribed by the section and record findings on each of them before coming to the conclusion whether maintenance and expenses should be awarded.[1] Disobedience of decree for restitution of conjugal rights is no ground in terms of Section 24. The discretion u der this section has to be used judicially. Opportunity should be given to the wife to show that she has income contemplated by section.[2] The award of maintenance and expenses of proceedings under Section 24 is no doubt in the discretion on the Court. But that discretion is a judicial one exercised on sound legal principles and not by caprice or humour. The exercise of discretion depends upon the circumstances of each particular case. If the discretion is exercised perversely so as to prejudice a party the High Court will be justified in interfering with it under Section 115, C.P.C.[3] In the same case their Lordships have enunciated that the following reasons ase not sufficient to deprive the applicant of maintenance and expenses of proceedings:

(a) that the wife refused to live with the husband where even of the allegations of the husband the refusal is due to the incapacity of the wife for sexual act and her abhorrence of it on account of some physical or psychological defect ;

(b) that attempts at reconciliation failed, where the failure cannot be ascribed to the wife but was due to the unwillingness of the husband to keep her because of her incapacity to consummate the marriage;

(c) that the wife did not take any steps to claim maintenance before the husband's petition for divorce ; or

(d) that her father is supporting the wife.

In a suit for judicial separation by the husband, wife applied for alimony *pendente lite* and the Court ordered imposing condition that application will not be heard unless she files written statement in the suit, and rejected her application for time to file her written statement till after the decision of alimony matter and setting suit for exparty hearing. Both orders are unwarranted by law and must be set aside.[4] The goodwill or charity of relations and friends cannot be taken into account while ordering any grant of maintenance or expenses. Merely because of a potential capacity to earn something by the wife cannot be a ground for refusal. Further, Section 24 does not envisage substitution of customary ornaments for income nor can Court to refuse to make a grant merely because wife can pull on for some time by selling ornaments.[5] The question to serve interrogatories in interlocutory proceedings under Section 24 Court can issue interrogatories in exercise of its inherent powers under Section 151 C. P. C.[6] Interim relief under this section

1. AIR 1964 Orissa 122.
2. (1965) 67 Punj LR 1252.
3. AIR 1958 Raj 322.
4. *Smt. Latika Ghosh* v. *Nirmal Kumar Ghosh*, AIR 1968 Cal 68.
5. *Radhikabai* v. *Sadhuram Awatari*, AIR 1970 MP 14 : 1969 MPLJ 565.
6. *Ganga Devi* v. *Krushna Prasad Sharma*, AIR 1967 Orissa 19.

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can be granted even if objection to jurisdiction is raised and not decided provided that Court *prima facie* has jurisdiction.[1] A petition for dissolution of marriage by husband cannot be dismissed for non-compliance of its order under Section 24.[2] The maintenance *pendente lite* and expenses of proceedings can be granted even before determination of question of jurisdiction raised by party.[3] The conduct of either party is immaterial so far as grant of maintenance *pendente lite* and expenses of proceedings is concerned, although it is relevant for passing an order under Section 25.[4] Court may exercise inherent power and stop further proceeding till the maintenance and expenses are paid and dismissal is not proper.[5] In wife's application for judicial separation, she was granted *pendente lite* maintenance where in the husband failed to pay the amount order by the Court defence cannot be struck off.[6] If the husband wilfully fails to comply with orders of maintenance *pendente lite* and expenses of the proceedings in order to harass the wife, husband is guilty of contempt of Court and liable to be punished under Section 12 of the Contempt of Courts Act, 1971.[7] If the husband's petition for restitution of conjugal rights was dismissed with costs in default of the appearance there was no question of the wife praying to defend any proceedings and such interim order cannot be passed with the termination of the main proceeding.[8] The Court can vary its earlier order under this section in the light of the changed circumstances.[9] The application under Section 24 cannot be disposed of after the determining of main petition is wrong.[10] The only consideration that should enter the judicial mind is whether the applicant is possessed of sufficient means for his or her support and, necessary expenses of the proceeding.[11] In a wife' s application for interim maintenance the care consideration is whether she is not having any independent income of her own sufficient to support herself.[12] Where from the affidavits it is clear that she has neither a job nor other means she will be entitled to interim maintenance and litigation expenses.[13] Section 24 does not stipulate anything about the standard to be maintained by either of the parties nor does it stipulate that the wife must be maintained at the same standard as the husband and *vice versa*.[14] At the same time, it should be clear that the husband has an independent source of income and is in a position to make payment.[15] The fact that the wife had been managing to maintain herself for quite sometime

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1. *Surendra Kumar Asthana* v. *Smt. Kamlesh Asthana*, AIR 1974 All 110.
2. (1975) 2 APLJ 70 : (1975) Andh LT 321.
3. 1973 Rajdhani LR 57 : ILR (1973) 2 Delhi 260.
4. *Lallubhai Keshav Ram Joshi* v. *Nirmalaben Lalluram Joshi*, AIR 1972 Guj 174 : 13 Guj LR 626.
5. ILR (1973) Mys 370.
6. 1975 Hindu LR 387 (Punj).
7. 1974 Punj LJ (Cri) 430.
8. *Nirmala Devi* v. *Ram Das*, AIR 1973 Punj 48.
9. 1972 Rev LR 236 (Punj).
10. *Chhaganlal* v. *Smt. Sakha Devi*, AIR 1975 Raj 8.
11. *Saraswati* v. *Krishnamurti*, AIR 1960 AP 30.
12. *Babulal* v. *Ramlata*, AIR 1974 Raj 93.
13. *Jamnadas* v. *Smt. Sahiboo*, AIR 1975 HP 18.
14. *Preeti* v. *Ravind*, AIR 1979 All 29.
15. *Leela Devi* v. *Jarick Bhand*, (1978) 80 Punj LR 744 ; *Balbir Kaur* v. *Raghbir Singh*, AIR 1974 Punj 225.

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prior to the institution of the petition though the husband had not contributed anything will not disentitle her to claim interim maintenance.[1] The wife is entitled to be paid interim maintenance irrespective of place of her residence.[2]

12. **"Proceedings under the Act".**—Section 28 (2) of the Act if read in isolation does give an impression that its construction is suggestive that proceeding under Section 25 are not proceedings under the Act. It would however be wrong to rely exclusively on the construction of Section 28 (2) for recording a finding that Section 24 has no application to proceedings under Section 25 of the Act. In view of the fact that the provision for permanent alimony is incidental to the granting of a decree for divorce etc. and the proceedings under Section 25 are in the nature of continuation of the main proceedings, it would be just to hold that 'proceedings under the Act' in the context of the application of Section 24 thereto.[3]

13. **Affidavits.**—Where an application was filed herself by wife and on behalf of her two children for alimony and expenses pending decision in a divorce petition filed by the husband. Affidavit was filed by both the parties. Application was dismissed by the Courts below. It was held that if the question had to be decided on the basis of the affidavits, the court was bound to consider the question as to whose version was more acceptable. Therefore, the approach of the court below was totally erroneous.[4]

14. **Appeal.**—An order passed under Section 24 is appealable to the High Court and not to the District Court under Bengal, Agra and Assam Civil Courts Act, Section 21.[5] The order refusing to grant interim maintenance is not appealable.[6] The applicability of Section 28 is to be determined by provision of C. P. C. Order under Section 24 is not appealable.[7] The order of granting maintenance and expenses under Section 24 is not appealable but revision lies.[8] The appeal lies from an order under Section 24 under Section 104 read with Order 43, Rule 1, C. P. C.[9] The appeal lies under Section 28 from an order passed under Section 24 of the Act.[10] The order under Section 24 is appealable under Section 28.[11] An order passed under Section 24 granting maintenance is not appealable.[12] The orders under Sections 24, 25 and other similar sections of Act are appea lable under Section 28 of the Act.[13] The order of

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1. *Mukan Kunwar* v. *Ajeet Chand*, AIR 1958 Raj 332.
2. *Leelavathy* v. *Sundar Athmaseelan*, AIR 1977 Mad 409.
3. *Chuni Lal Gulati* v. *Krishana Rani*, AIR 1983 P & H 241 at p. 243 : 1983 Hindu LR 34.
4. *Radhakumari* v. *K. M. K. Nair*, 1982 (2) Civi LJ 217 at p. 224 (Ker.).
5. AIR 1961 All 395 (FB).
6. AIR 1960 AP 30 (DB).
7. AIR 1960 Bom 315.
8. AIR 1962 Cal 455.
9. AIR 1964 Orissa 122.
10. AIR 1962 Punj 127.
11. *Kode Kutumba Rao* v. *Kode Sesharatnamamba*, AIR 1967 AP 323 (FB).
12. *R. P. Muniswamappa* v. *Eramma*, AIR 1968 Mys 8.
13. *P. C. Jairath* v. *Mrs. Amrit Jairath*, AIR 1967 Punj 148.

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granting maintenance and expenses of proceedings would be appealable under Section 28.[1] If the wife's application for maintenance under Section 24 is dismissed by subordinate Judge, the District Court is competent to hear appeal against such interim order.[2] The order of the District Judge under Section 24 refusing alimony and legal expenses under Section 24 is appealable under Section 28.[3] The interlocutory order passed under Section 24 of this Act is appealable under Section 28.[4] The interlocutory order of maintenance is appealable under Section 28, does not distinguish the kind of orders passed under the Act and makes all kinds of orders passed under the Act appealable.[5] The period of Limitation for prefering a second appeal to the High Court under Section 28 is 90 days.[6] The delay in filing appeal can be condoned under Section 5 of Limitation Act on facts on circumstances of each case.[7] The appeal being a creature of a Statute and there being no provision in Section 28 of the Act for an appeal from the order under Section 24, such an appeal is incompetent.[8] The appeal is "proceeding" within the meaning of Section 39 of Marriage Laws (Amendment) Act, 1976 and hence appeal would not lie although proceeding under Section 24 had started before and Section 28 was amended. The order of granting temporary alimony under Section 24 is not appealable under Section 28.[9] After the amendment of 1976 appeal lies, in the case of orders only if they are orders made under Section 25 or 26. However, even under these sections, if any interim order is made, it is not appealable. No appeal lies against orders made under any other section of the Act for right of appeal must be conferred by Act.[10] In a divorce petition, application under Section 24 for interim maintenance and expenses if ordered by the Court is not appealable but revision lies. Though Section 24 in terms refers only to the wife or husband making an application, the Court has got power under Section 26 to make interim order in respect of maintenance of minor children.[11] A decree passed by the Court of Small Causes, act as 'District Court' and hence appeal and not a revision against the decision is maintainable.[12] An order staying the proceeding in a divorce petition until the application under Section 24 of the Act is disposed of is not open to appeal.[13] No appeal lies now against the order under Section 24.[14] An order upon an application under this section is appealable under Section 28.[15]

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1. *Madhukar Trimbakrao Ghisad* v. *Malti Madhukar Ghisad and another*, AIR 1973 Bom 141.
2. *Lallubhai Keshavram Joshi* v. *Nirmalaben Lalluram Joshi*, AIR 1972 Guj 174.
3. AIR 1975 J & K 83 (FB).
4. *Parashuram Rao Anantha Rao Pise* v. *Smt. Pratibha Parashuram Rao, Pise*, AIR 1975 Kant 31 : (1974) 1 Kant LJ 265 : 1974 MPLJ 394 : 1975 (2) Cut WR 601.
5. *Santosh Kumari* v. *Chaman Lal*, AIR 1978 J & K 4
6. *Indraj* v. *Smt. Shanti*, AIR 1978 All 279
7. *Kanti Bai* v. *Kamal Singh*, AIR 1978 MP 245.
8. *Raj Pal* v. *Smt. Dharmavati*, AIR 1980 All 350.
9. *Ram Narayan Pathak* v. *Smt. Urmila Devi*, AIR 1980 All 344.
10. *Narendra Mehta* v. *Suraj Mehta*, AIR 1982 AP 160.
11. *Smt. Subhasini* v. *B. R. Umakanth*, AIR 1981 Kant 115.
12. *Chandraswarup* v. *Smt. Manorama*, AIR 1981 All 230.
13. *Dhaniram* v. *Smt. Sushila Devi*, AIR 1977 HP 83.
14. *Narayan Singh* v. *Smt. Rukmini*, AIR 1977 HP 93.
15. *Tarlochan* v. *Smt. Mohinder*, AIR 1981 Punj 308.

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15. Step for prosecution of appeal.— It would be an injustice to the respondent-wife if the appeal is heard in the absence of a counsel for her. The order directing the appellant to pay litigation expenses and maintenance to the respondent-wife under Section 24 of the Act is in the nature of a step for the prosecution of the appeal. As the appellant has not complied with the said order, the appellant cannot be heard in support of his appeal.[1]

25. Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, [2][***] pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, [3][the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, [4][it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just].

SYNOPSIS

1. Scope.
2. "At the time of passing any decree."
3. Section 25 vis-a-vis the Hindu Adoptions and Maintenance Act.
4. Court exercising jurisdiction under this Act.

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1. *Ram Narain* v. *Smt. Daropdi Devi and another*, AIR 1983 Delhi 346 at pp. 346 and 347 : 1983 Rajdhani LR 4 : (1983) 4 Del Rep J 79 : (1983) 1 DMC 153.
2. The words "while the applicant remains unmarried" omitted by Marriage Laws (Amendment) Act, 1976.
3. The words in brackets subs. by ibid.
4. Subs. by the Marriage Laws (Amendment) Act, 1976.

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5. "At the time of passing any decree or at any time subsequent thereto."
6. "On application made to it by either the husband or the wife."
7. Order can be made in favour of unsuccessful spouse.
8. Delay.
9. Payment in one lump or instalments.
10. "Having regard to the respondent's own income and other property of the occupant."
11. Conduct of the parties.
12. Variation or forfeiture of maintenance.
13. Maintenance *pendente lite* and litigation expenses—From what date to be granted.
14. Application for maintenance.
15. Divorced wife - Decree for permanent alimony and maintenance—Death of husband—Effect.
16. Application under Section 25 - Forum - Jurisdiction of the Court.
17. Decree for restitution of conjugal rights in favour of wife—Jurisdiction of the Court to grant permanent alimony.
18. Jurisdiction of Court—Petition for decree for divorce for permanent alimony.
19. Agreement.

1. Scope. -The section although it recognises the right of the wife and the husband to be in *equali juril* in the matter of maintenance when a decree is passed granting relief in any matrimonial cause, is primarily intended to secure maintenance and support for the wife in whose favour a decree is made granting any of the reliefs under the Act. In the majority of cases that come before the Court the decree is for judicial separation or for divorce on the ground of the delinquency of the other spouse which having committed adultery or cruelty or with desertion. The obligation of the husband provide for his wife's maintenance and support does not come to an end simply on the passing of a decree for any of the reliefs which the Court is empowered to grant under the Act even when the decree is in favour of the husband. The Court is empowered to direct that the amount to be paid by one spouse to another shall be in the form of a gross sum or in the form of monthly or other periodical payments. The duration of such payments is limited to the life of the applicant. The Court is also empowared to vary, modify or rescind any such order in view of the change in the circumstances of the party. The order would be rescinded upon proof of re-marriage or unchastity of the party in whose favour it has been made. The right or maintenance being a statutory right a party cannot contract herself or himself out of the same. Thus a wife cannot bind herself by agreement with her husband to forgo her right of applying to the Court for maintenance in matrimonial proceedings between them.[1] The principle will not, however, apply to an undertaking given by a party to the Court not to ask for a variation of an order for maintenance made by the Court.[2] The section makes departure in certain respects for analoguous rules relating to payment of permanent alimony and maintenance enacted in the Special Marriage Act, 1954 and the Matrimonial Causes Act, 1950. An order

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1. *Barucha* v. *Bharucha*, (1945) 47 Bom LR 514.
2. *Russell* v. *Russell*, (1956) 1 All ER 466.

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for maintenance can be made under this section not only in favour of wife but may be made in favour of the husband by the Court passing in a decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriage. The present rule though it introduces an unusual and somewhat grotesque feature in this branch of the law, has the merit of enabling the Court to grant effective relief in deserving cases, for intance that of a destitute husband against whom proceedings under the Act are adopted by the wife and decree is passed on the ground of his insanity or his being afflicted with leprosy or where for instance a wife who is possessed of substantial property has unreasonably deserted the husband who has no independent income.

This permanent maintenance called permanent alimony has to be ordered by the Court exercising jurisdiction under this Act in respect of the main petition for relief.[1] The order may be made at the time of passing the decree or subsequently.[2] Since under the section the Court may award maintenance on application made at the time of passing any decree or at any time subsequent thereto permanent alimony cannot be granted when a petition for relief is dismissed.[3] There is nothing in Section 125 to hold that 'decree' means only a decree granting the relief asked in the petition and not one dismissing a petition. Section 25 provides a remedy by a simple application in addition to other remedies which may be open to a wife such a remedy under the Criminal Procedure Code or a remedy by way of a suit under the Code of Civil Procedure, Section 25 must therefore be considered as partly substantive and partly as procedural whether it is described as incidental or ancillary or supplementary or complementary to the main proceeding under the Hindu Marriage Act.[4] Where a decree for divorce passed by the lower Court against the wife on the ground of his adultery was confirmed on appeal the lower Court can pass an order for maintenance in support of the wife provided she remained without remarrying.[5] But it cannot be denied that this provision for compelling the wife to pay maintenance to the husband in appropriate cases is certainly welcome, because cases can easily be imagined where a rich wife deserting her impecunious and indigent husband ought not to be allowed to see her husband, against whom she had a decree for separation or divorce, stra e in the streets after having lived with him in opulence and plenty. The maintenance is exigible only so long as the party procuring it does not remarry. The moment he or she re-marries, it is open to the other party to ask for cancellation of the order for maintenance.

The Court is not entitled to pass an order for permanent of alimony in favour of the wife, when the petition made by the husband for restitution of

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1. *Ramchandra Behara* v. *Snehalata*, (1976) 2 CWR 939.
2. See *Harilal* v. *Lilavati*, AIR 1961 Guj 202 ; *Shantaram* v. *Hirabai*, ILR (1962) Bom 195 : AIR 1962 Bom 27 ; *Dharamshi Premji* v. *Bai Sakar Ranji*, AIR 1968 Guj 150 ; *Kuldip Chand* v. *Geetha*, AIR 1977 Delhi 124 ; *Munuswami Raju* v. *Hamsa Rani*, (1974) 2 MLJ 237 ; *Somyanarajan* v. *Jayalakshmi*, (1971) 1 MLJ 427.
3. *Chinna Babu* v. *Parbiti*, AIR 1967 Orissa 163 ; *Shakuntalabai* v. *Sahebrao*, 1976 Mah LJ 512.
4. *Shakuntalabai* v. *Sahebrao*, ibid.
5. *Raghunath* v. *Rani Dei*, (1972) 1 CWR 717.

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conjugal rights has been dismissed.[1] The word 'decree' in Section 25 of Hindu Marriage Act means only a final order and includes dismissal of the application.[2] Where second marriage has been contracted during the subsistence of the first; notwithstanding the nullity of marriage, either party thereto is entitled to claim maintenance.[3] The application for permanent alimony under Section 25 and for interim maintenance by wife was resisted on the ground of unchastity is held to be groundless. The word 'any proceeding' includes application under Sections 24 and 25.[4] The husband's petition under Section 9 for restitution of conjugal rights if dismissed, order of maintenance to wife under Section 25 is illegal and without jurisdiction.[5] Section 25 (1) enjoins either on the husband or wife even after divorce decree is passed to pay maintenance to other. The parties to a decree of nullity of marriage or decree for restitution of conjugal rights are entitled to get maintenance, even after passing of the decree.[6] The term 'wife' and 'husband' merely referred to parties who have gone through the marriage ceremony and do not signify an existing relationship of spouses.[7]

2. **"At the time of passing any decree".**—The expression "passing any decree" in Section 25 means granting any relief of the nature specified in Sections 9 to 13, where the expression 'decree made' under the Act, in Section 28 means decree granting or refusing relief. It cannot be the intention of the legislature to attach finality to order of dismissal of petition under Section 9 to 13. Therefore an appeal against dismissal of the petition by husband under Section 9 for restitution of conjugal right is maintainable under Section 28.[8] The use of the words "at the time of passing any decree" in the section shows that the power is intended to be exercised at the time of passing any of the decrees referred to in the earlier provisions of the Act or any time subsequent thereto. The section is equally applicable to proceedings for obtaining a decree for restitution of conjugal rights a decree for judicial separation or divorce or nullity of marriage.[9] It looks as if the terms "wife" and "husband" in the section do not signify an existing relationship as spouses at the time when application under the section is made but as terms to refer to parties who

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1. *Harilal* v. *Lilawati*, AIR 1961 Guj 202; *Chinnababu* v. *Parbiti*, AIR 1967 Orissa 163; *S.* v. *R.*, AIR 1968 Delhi 79.
2. *Shakuntala* v. *Sahebrao*, 1976 Mah LJ 512.
3. *Govindrao* v. *Anandibai*, AIR 1976 Bom 433.
4. *Yogeshwar Prasad* v. *Jyoti Rani*, AIR 1981 Delhi 99.
5. *Darshan Singh* v. *Mst. Daso*, AIR 1980 Raj 102.
6. *Ratnaprabha* v. *Shadoksharaiah Rudrayya Swami*, AIR 1982 Kant 170.
7. *Ibid.*
8. *Darshan Singh* v. *Mst. Daso*, AIR 1980 Raj 102.
9. *Kuldip Chand* v. *Geeta*, AIR 1977 Delhi 125 at p. 128; *Govindrao* v. *Anandibai*, 79 Bom LR 73 : AIR 1976 Bom 433 at p. 438; *Munuswami Rajoo* v. *Hamsa Rani*, (1974) 2 MLJ 237 at p. 240 : 87 LW 537 : AIR 1975 Mad 15; *Dayal Singh* v. *Bhajan Kour*, AIR 1973 P & H 44; *Sheshadri* v. *Jayalakshmi*, AIR 1963 Mad 283 at p. 286; *Mina Rani* v. *Dasrath*, AIR 1963 Cal 428 at p. 439; see also *Nathu Lal* v. *Mana Devi*, AIR 1971 Raj 203; *Narayanaswami Reddiar* v. *Padmanobhan*, (1966) 1 MLJ 529 : AIR 1966 Mad 394; *Gunavantray* v. *Bai Prabha*, AIR 1963 Guj 242.

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have gone through a ceremony of marriage which is valid or subsisting.[1] Again the relevant words in Section 25 are "applicant" and "respondent." Since "applicant" has reference to the party applying "respondent" should mean the party opposing the application or against whom an order under the section is sought.[2]

A petition under Section 25 by divorced spouse is maintainable.[3] The arrears of maintenance can be granted from the date of original application for judicial separation though application for maintenance might have been made later.[4] Where no decree for divorce is passed, application for alimony cannot be allowed. A wife who got her marriage with her husband annuled by a decree of nullity on the ground of impotency of the husband under Section 12 (1) (a) is entitled to get maintenance on her application under Section 25 subsequent to the passing to the decree of nullity.[5] Under Section 25 alimony can be ordered only by Court exercising jurisdiction under Hindu Marriage Act.[6] The discretion to grant maintenance under Section 25 of the Act vested in the Court which has awarded a decree of conjugal rights under Section 9 is wider and cannot be controlled by the provisions of the Hindu Adoptions and Maintenance Act. Therefore a wife who has obtained a decree for conjugal rights, on a refusal by the husband to keep her, is entitled to apply for grant of maintenance of Section 25 of the Hindu Marriage Act without filing a suit for it under the Hindu Adoptions and Maintenance Act and the Court can in its discretion grant it.[7]

3. Section 25 vis-a-vis the Hindu Adoptions and Maintenance Act.— The power conferred on the Court under Section 25 creates a corresponding right in the wife or husband to get mainteance provided the conditions laid down for the grant of the same are satisfied. Not only does Section 25 (1) provide a remedy but it also confers a right. Since the Hindu Adoptions and Maintenance Act 1956 is a latter legislation it could not have been the object of Section 25 (1) to create for the enforcement of the right to maintenance under the 1936 Act.[8] Again while Section 18 of the 1956 Act enables a wife to claim maintenance even without filing any petition for matrimonial relief, Section 25 (1) of the Hindu Marriage Act does not confer such a right.[9] Whereas Section 25 (1) contemplates that not only the wife but even the husband would in certain circumstances be entitled to get maintenance.[10] The Court's discretion under Section 25 is not controlled by the Hindu Adoptions and Maintenance

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1. *Sisir Kumar* v. *Sabita Rani*, AIR 1972 Cal 4 ; *Dayal Singh* v. *Bhajan Kaur*, AIR 1973 P & H 44 ; *Govindrao* v. *Anandibai*, AIR 1976 Bom 433 ; *Jayalakshmi* v. *Suryanarayana*, (1971) 1 MLJ 427 ; *Kuldip Chand* v. *Geeta*, AIR 1977 Delhi 125 at p. 128.
2. *Amar Kanta Sen* v. *Savana Sen*, AIR 1960 Cal 438 ; *Kamla Shama Sindhi* v. *Shama Rupchand Sindhi*, 60 Bom LR 633 at p. 635.
3. 1967 All LJ 38.
4. (1966) 70 Cal WN 633.
5. *Sisir Kumar Kundu* v. *Smt. Sabita Rani Mandal*, AIR 1972 Cal 4 ; 75 Cal WN 932.
6. *Smt. Prema* v. *M. Ananda Shetty*, AIR 1973 Mys 69.
7. *Seetha Ram* v. *Pholi*, AIR 1972 Raj 313.
8. *Govindrao* v. *Anandibai*, 79 Bom LR 73 : AIR 1976 Bom 433 at p. 438.
9. *Ibid.*
10. *Ibid.*

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Act. In a case where the wife has obtained a decree for restitution under Section 9. the Court can grant permanent alimony to the wife under Section 25 without filing a suit for it under the Hindu Adoptions and Maintenance Act.[1] Under Section 25 it is not obligatory to grant maintenance as required by Section 23 of the Hindu Adoptions and Maintenance Act. It may be that under Section 18 (3) of the latter Act an unchaste wife will forfeit her separate maintenance granted under that enactment; but that does not mean that the interpretation of Section 25 of the Hindu Marriage Act has to be restricted so as to apply it only to those cases where the wife is not guilty of adultery. Thus, the Court has jurisdiction to award maintenance in cases of judicial separation ordered because of an act of adultery.[2]

4. Court exercising jurisdiction under this Act.—These words only mean that the order for permanent maintenance can be passed only by the Court exercising the jurisdiction under this Act for the purpose of giving relief in the main petition either by way of restitution of conjugal rights or judicial separation or nullity declaration or divorce. Though the section gives no indication on the question whether either party to a main petition for relief against a matrimonial offence can resort to any other Court for maintenance after the termination of the main proceeding by a decree, and the word "may" appears to make the procedure under this section only optional, and not exclusive, it is fairly clear that inasmuch as the matrimonial Court has been seized of the matter and has gone into the merits of the controversy between the parties and knows who had committed the wrong and where the justice lay. The intention of the Legislature is that the party should only resort to this Court and not to any other Court in the realm for the relief of maintenance. The words "at the time of passing any decree" may support the argument that it is only if the main petition is decreed that a maintenance order for life of the petitioner can be passed by the matrimonial Court and not when the petition is dismissed,[3] and as by the dismissal of the matrimonial proceeding left in the position in which they were prior to the institution of the matrimonial proceeding under this Act the ordinary Court of the country has jurisdiction to entertain a suit for maintenance. There are two ways of considering this question. One construction is to hold that passing *any decree* includes passing a decree or dismissal of the petition. In this view, the Court having jurisdiction for ordering permanent maintenance is the matrimonial Court under the Act. If, on the other hand, the expression "passing any decree" should be construed as "passing any decree allowing the petition" then the above contention would be plausible.[4] It appears, however, that the former construction is the preferable one. A decree may be a decree allowing the petition or a decree dismissing the petition. The words "any decree" must take in both kinds of decrees. If the latter construction should be considered as the correct one, then the words will not be "any decree" but merely "a decree".[5]

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1. *Seetharam* v. *Phooli*, AIR 1972 Raj 313.
2. *Kunhikannan* v. *Malu*, AIR 1973 Ker 272 : 1973 Ker LT 431.
3. *Purushotam* v. *Devki*, AIR 1973 Raj 3 ; See also *Shantaram* v. *Malti*, 65 Bom LR 441 ; *Shantaram* v. *Hirabai*, AIR 1962 Bom 27 ; *Kadia* v. *Kadia*, AIR 1961 Guj 202 ; *Minarani* v. *Dasrath*, AIR 1963 Cal 428.
4. *Ramachandra Behera* v. *Snehalata Dei*, 1976 (2) CWR 939.
5. But see *Minaram* v. *Majundar*, AIR 1963 Cal 428.

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Besides there is no meaning in allowing the parties to go to some other Court and start their battle once again after they had done it before the matrimonial Court which knows their respective strength and can be expected to do justice, especially when the Court is one of the superior Court in the country being a District Court or its equivalent.

5. "At the time of passing any decree or at any time subsequent thereto."—The words "at the time of passing any decree or any time subsequent thereto" indicate that an order for permanent alimony or maintenance in favour of the wife or the husband can only be made when a decree is passed granting any substantive relief under the Act and not where the main petition itself is dismissed[1] or withdrawn.[2] The rule laid down in the section relates only to ancillary relief which is incidental to the substantive relief that may be granted by the court although the incidental relief may be given to either party to the petition. The view expressed in this paragraph has been accepted by the High Court of Gujarat in two decisions.[3] The application for maintenance may be made at the time of passing of the decree for restitution of conjugal rights of judicial separation, or dissolution of marriage on by divorce or annulment of the marriage on the ground that it is void or voidable or even at any time subsequent thereto and there is no bar of limitation in the matter of presentation of such application. Nor would delay however great in presenting the application be any bar to the claim for maintenance. Section 23 (1) (d) which in effect lays down that no relief will be granted under the Act where there has been unnecessary or improper delay in instituting the proceeding applies only to substantive proceedings for any of the reliefs mentioned above and not application for maintenance under this section which provides only for ancillary relief and is incidental to any such proceeding for substantive relief. Section 37 of the Special Marriage Act, 1954, contains provisions which are *in pari materia*. The position however under the Indian Divorce Act, 1869, which followed the English Law is materially different. Section 37 continues to be somewhat different under the English Matrimonial Act of 1950.

In the main matter the enquiry related mostly to the investigation of the causes and consequences of the matrimonial offence and could only have a remote bearing on the question of maintenance. So if the question of the quantum of maintenance which will be appropriate in the circumstances and which could only be decided after evidence with respect to the respective means and income of the spouses requires further evidence when sufficient evidence had not been let in on that question in the main enquiry itself as in conceivable cases it might not have been, the Court need not take further time with reference to the granting of relief on the main matter and may well postpone the question of maintenance to a further enquiry after the passing of the main decree. Therefore, the provision for an order being passed subsequent to the passing of the decree has been made. It is also pertinent to observe that an order for permanent maintenance can be passed only on an application, and in any particular case that

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1. *Devasakayam* v. *Devamony*, ILR (1923) 46 Mad 133 ; *Minarani* v. *Dasarath*, 63 AC 428.
2. *Shantaram* v. *Hirabai*, 62 AB 27 ; AIR 1962 Bom 125 : 63 Bom LR 76.
3. See *Harilal* v. *Lilavati*, AIR 1961 Guj 202 at p. 206 ; also see *Shanta Ram* v. *Malti*, 64, AB 83.

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application might not have been made before the passing of the decree, in such a case the order for permanent maintenance must necessarily be after the passing of the decree. This position is not correct and the decision to that effect is overruled by the decision in *Patel Dharmshi Premji* v. *Bai Sakar Kanji*.[1] This case also holds that even an erring spouse can be granted permanent alimony.[2] Section 25 does not negative the power of the Court to pass an order for permanent alimony for a wife against whom a decree has been passed at the instance of the husband.[3] It was further held in *Patel Dharmshi Premji* v. *Bai Sakar Kanji*,[4] that the mother cannot include the son's maintenance in her allowance but she can ask for it in a separate proceeding. The question of quantum of maintenance being essentially a matter for investigation on evidence which may not be quite germane to the evidence let in with reference to the matrimonial offence charged in the main petition, it is also proper that it should be in many cases investigated subsequent to the passing of decree as often happens in other ordinary civil suits involving enquiry into profits as in a suit for possession or partition. In awarding maintenance under Section 25 (1), a finding recorded in a proceeding for judicial separation that the wife had been unchaste can be taken into consideration for reducing the rate of maintenance.[5]

6. "On application made to it by either the husband or the wife" — An order for permanent alimony or maintenance under this section can be made not only in favour of the wife but may be made in favour of the husband by the court passing any decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriage, the application can be made by either party to the substantive petition whether petitioner or respondent to the substantive petition and not merely the petitioner to the same. A respondent to any such petition which is dismissed who wants this ancillary relief will have to adopt substantive proceedings for any relief under the Act and the question of maintenance can arise if such proceeding terminates successfully in his or her favour.

Cases can easily be conceived of the husband being the worse sufferer and deserving sympathy at the hands of the Court, as against a well-to-do ungrateful wife. For instance, the husband suffering from venereal disease or leprosy which might have supervened after the marriage may be the respondent in a petition for divorce or judicial separation by a well-to-do wife. If in such a case the husband should be left in the streets without anybody to take care of him or spend money to relieve his distress and pain from the disease, it does not stand to decency and will certainly be abhorrent to all finer sentiments of conjugal relations and sympathy which ought to subsist in such a contingency. Therefore to arm the Court with a power to direct the wife in such a situation to pay a maintenance allowance to the husband would be perfectly proper and reasonable. This would be so whether the husband is the successful or the unsuccessful party in the main petition, whether he is the petitioner or the respondent therein. A further question may arise whether the application for the maintenance can be an oral

1. AIR 1968 Guj 150.
2. See also *Kunhikannan* v. *Malu*, AIR 1973 Ker 273; *Varalakshmi* v. *Hanumantha Rao*, AIR 1978 AP 6 : (1978) 1 An. WR 32.
3. *Lalithamma* v. *Kannani*, AIR 1966 Mys 178.
4. AIR 1968 Guj 150.
5. *Rajagopalam* v. *Rajamma*, AIR 1967 Ker 181.

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one. Though the section says an application should be made for the purpose of getting the maintenance ordered, it does not indicate whether it should be in writing and whether it cannot be merely oral. But since the application for maintenance requires fresh evidence in many cases, evidence which is not of the same type or category as the evidence in support or denial of the main matrimonial charge and this application for maintenance has to set out the facts relating to the income of the parties, their expenses, and the amount of the margin of surplus, the conduct that may have relevance in the fixation of the amount, the type of life that the parties led, their status and so many other things which may have a bearing upon the question of the quantum of maintenance ultimately to be decided as awardable, it is preferable to hold that a mere oral application is not intended and that a written application in the form that may be prescribed by rules made by the High Court should be insisted on.

7. **Order can be made in favour of unsuccessful spouse.**—The language of the section is wide enough to empower the court to make an order of allotment of permanent alimony or for permanent maintenance in favour of the respondent against whom the decree has been passed and there is nothing to prevent the court from making any such order if in the exercise of the discretion vested in it the court deems it just to do having regard to all the relevant factors and circumstances of the case. So wide is the discretion vested in the Court under the present section in this behalf that an order under it may for instance be made in favour of a wife even if a decree for judicial separation has been passed against her on the ground of adultery or cruelty or desertion on her part. The discretion is the ground of adultery or cruelty or desertion on her part. The discretion is judicial and would be exercised in favour of a spouse found guilty of matrimonial misconduct only where the Court is satisfied that such an order should be made in the interest of justice. The same considerations would apply where the court passes a decree for any other relief under the Act and the respondent though shown to have been guilty of a matrimonial offence or to have been in the wrong can ask for an order for permanent maintenance even when dissolution of marriage by divorce or annulment of the marriage is decreed against the respondent. There is nothing in the section about a "compassionate allowance" but in awarding maintenance the court must have regard to the conduct of the parties. Sometimes the task is not easy but the Court if it decides to award maintenance has to fix the amount as best it can. There can be no set of fixed principles applicable to all cases of the nature that may fall for consideration under this head and the decision must rest on the facts of each case and the sense of propriety and moral justice of the Court. The respondent would be in a strong position when the decree has gone against the respondent on the ground of insanity or the respondent's suffering from leprosy or on any ground where though relief is granted to the petitioner it cannot be said that the respondent was guilty of any matrimonial offence or any blameworthy conduct.

8. **Delay.**— There is no limitation for preferring an application for an order of permanent maintenance. The very fact that the petition can be filed even after the passing of the decree shows that there is no time factor that necessarily enters into the question of the maintainability of this application. There is no limitation for preferring an application for an order of permanent maintenance. The expression "at any time subsequent to the decree" does not, however, cannot unlimited but a reasonable time having regard to all the circumstances of the case.[1] The question whether there has been unreasonable

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1. *Govindrao* v. *Anandibai*, AIR 1976 Bom 433.

or improper delay has to determine on the facts and circumstances and to be a certain extent the Court has a discretion in the determination of the question.[1] The indication in Section 23 (1) (d) that in any proceeding under this Act, whether defended or not, if the Court is satisfied that there has been any unnecessary or improper delay in instituting the proceeding the Court shall not decree the relief applies only to the main proceeding like a petition for restitution of conjugal rights, divorce, etc., and not to a subsidiary or incidental proceeding asking for an order for maintenance.[2] In this connection, the difference between the expression "decree" in the closing lines of Section 23 and the expression "order" with reference to the maintenance application, may also be noticed in support of the position that mere delay is not fatal to the maintainability of the application. This, however, does not mean that the Court will not or cannot take into consideration the delay in filing the application in adjudicating on that application. For after all the jurisdiction that the Court exercises in respect of the application for maintenance is essentially a discretionary jurisdiction in the exercise of which the conduct of the parties including delay in the presentation of the application will not fail to influence adversely the judicial mind.[3] In *Govindrao's case*,[4] the petitioner was driven out of the matrimonial home in March, 1963. On 6th June, 1969 she filed a Civil suit for maintenance and on 11th December, 1972 she filed a petition under the Hindu Marriage Act for declaration of nullity of marriage as violative of Section 5 (i) and for maintenance by way of permanent alimony. It was held that in the circumstances there was no unnecessary or improper delay. A delay of seven and a half years in filing an application for permanent alimony after passing of decree absolute was allowed and the application was considered to be within reasonable time in the special circumstances of the case.

9. Payment in one lump or instalments.—The amount awarded by way of maintenance may be made payable either in a gross sum or in such monthly or periodical amount as the Court may determine, for a term not exceeding the life of the applicant. Whether to grant a gross sum or a periodical payment is a matter of discretion of the Court and depends on what is reasonable in the circumstances of the case.[5] A lump payment may be directed where the husband had made substantial acquisitions during marriage towards which the wife had made a significant contribution.[6] Lump sum payment should not be ordered unless the respondent has capital assets from which the amount can be paid without reducing that person's earning power.[7] Where a husband is ordered to secure to the wife a gross or annual sum of money by way of permanent maintenance it may restrain him by injunction from dealing in the meanwhile his property so as not to affect his leaving sufficient security.[8]

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1. *Govindrao* v. *Anandibai*, AIR 1976 Bom 433.
2. *Jagdish Prasad* v. *Manjula*, 79 Cal WN 543.
3. *Orwan Klein* v. *Kathlien Klein*, AIR 1954 Cal 406.
4. AIR 1976 Bom 433.
5. *Jaylor* v. *Bleach*, 17 Bom LR 56; see also *Pratima* v. *Kamal Kumar*, (1964) 68 Cal WN 316.
6. *O'Donnel* v. *O'Donnel*, (1975) 2 All ER 993; *Cumbers* v. *Cumbers*, (1975) 1 All ER 1.
7. See *Watchel* v. *Watchel*, (1973) 1 All ER 329.
8. *Burrows* v. *Burrows*, (1929) 45 TLR 347, 401; *Nani Gopal* v. *Ranu Bala*, AIR 1965 Orissa 154.

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Where the amount of permanent alimony is made a charge on the movable and immovable property of the respondent such a charge is not admissible in so far as the provident fund amount of the respondent is concerned in view of Section 3 of the Provident Funds Act, 1925.[1] If the amount is paid in a lump sum, that would enure during the lifetime of the petitioner and any subsequent misconduct on his or her part can have to effect in making the applicant forfeit that amount so as to justify an order for payment of the amount or a proportionate part of it to the respondent.[2] In the case of a periodical sum being made payable either every month or otherwise the same may be varied at the instance of either party owing to change in the circumstances or may be stopped altogether for the misconduct mentioned in sub-section (3).

10. "Having regard to the respondent's own income and other property of the occupant". The section lays down that in arriving at the quantum of permanent alimony or permanent maintenance the court must have regard to the respondent's own income and property and the income and property of the applicant and the conduct of the parties and the amount may be such as seems to the court to be just. The section it will be noticed leaves the matter to the discretion of the court while stressing that the means of the parties and their conduct are factors which should always be regarded. The section does not purport to lay down any rigid rule or indicate any yardstick for the purpose nor does it point to any fixed criterion and leaves the matter for assessment to the discretion of the court while stressing that the means of the parties and their conduct are essential factors to which regard must always be had. It has to consider all the pertinent circumstances involving each of the parties. The elements and factors to be considered include everything having legitimate bearing on present or prospective matters affecting lives of both the parties which can obviously not be susceptible of proper enumeration. A husband obtained a decree of divorce on the ground of wife's insanity. To say that insane wife does not require substantial money for maintenance is wrong since to maintain insane person is more expensive than to maintain sane person.[3] Application under this section is maintainable after the decree for divorce is passed.[4] Where, the husband entered into a compromise agreeing to pay monthly allowance over and above the lump sum of alimony to his wife and upon failure to pay, the wife sought execution of the decree, the husband was estopped from going out of compromise.[5] The wife at relevant time was without employment though possessed of high qualifications. The husband getting net amount of Rs. 444 as salary per month after necessary deductions. Having regard to evidence and conduct of husband order awarding maintenance of Rs. 120 per month held just and proper.[6] Apart from the property or income available to either the husband or wife, the relevant factor to be considered is the conduct of the parties. The grant of alimony itself being a consequence or one of the consequences of the decree, the question whether any of the circumstances mention in Section 23 would operately bar would already have been considered by the court before passing the decree and need not be considered at the time of granting alimony.[7] The property and income of the wife which can

1. *Durga Das* v. *Tara Rani*, AIR 1971 P & H 141, 144.
2. *Nani Gopal* v. *Ranu Bala*, AIR 1965 Orissa 154.
3. 1967 All LJ 38.
4. *Patel Dharamshi Premji* v. *Bai Sakar Kanji*, AIR 1968 Guj 150.
5. 1970 Kash LJ 204.
6. *M. D. Krishnan* v. *M. C. Padma*, AIR 1968 Mys 226 : (1967) 2 Mys LJ 432.
7. *Smt. Lalithamma* v. *R. Kumar*, AIR 1966 Mys 178.

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be taken into account in determining the quantum of alimony under Section 25 (1) is the property and income which is exclusively that of the wife. It is not proper to take into account the possibility of the wife inheriting property from her relations like the father.[1] The Court has discretion in the matter of fixation of alimony to be paid from such a date as the Court may deem fit.[2] The fact that the decree for divorce was passed against wife for non-compliance with the decree for restitution of conjugal rights for a period of two years does not by itself disentitle her to permanent alimony.[3]

Net income signifies the income that remains after allowing for expenses of collection, income tax, wealth-tax and similar deductions.[4] Inescapable expenses should also be taken into account.[5] Net income does not connote what is left after the spouse under liability has spent all that is necessary for his or her own maintenance.[6] The net income of the concerned party must be decided in each case on its facts.[7] Where there is nothing to show the assets or the income of the wife, the alimony must be determined on the basis of the husband's income.[8] There is no hard and fast rule with reference to the determination of the appropriate quantum of maintenance whether it is the wife or the husband that is made entitled to it. A fair test that may be adopted is the test enunciated by the Privy Council in *Ekradeshwari's case*,[9] "Maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members on a reasonabbe view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living and to the age, habits, wants and class of life of the parties. In short, it is out of a great category of circumstances, small in themselves, that a safe and reasonable deduction is to be made by a Court of Law in arriving at a fixed sum." It was further observed that the sum awarded must enable the applicant to live as far as may be consistently with her position in something like the same degree of comfort and in the same reasonable luxury of life as she had before, with this addition that there may be circumstances in which the past mode of life of the applicant has been demonstrably on a penurious and miserly scale or on the other hand on a quite extravagant scale having regard to the total income. These observations may well apply to the case of determination of the appropriate quantum of maintenance awardable to the applicant under this section, with this qualification that in the determination of the appropriate amount, it is not only necessary to take the income and the property of the respondent and the applicant but also the conduct of the parties to the petition.[10] It is not correct or proper to insist upon any proportion being observed in the matter, especially when the quantum

1. *Smt. Lalithamma* v. *R. Kannan*, AIR 1966 Mys 178.
2. AIR 1970 Punj 341.
3. AIR 1971 Raj 208
4. *Kuriakase* v. *Kuriakase*, AIR 1958 Mad 340 ; *Lobo* v. *Lobo*, AIR 1939 Cal. 753 ; *R.* v. *R.*, ILR 14 Mad 88.
5. *Kershaw* v. *Kershaw*, (1964) 3 WLR 1143.
6. *Lobo* v. *Lobo*, AIR 1939 Cal 753.
7. *Jagdish* v. *Manjula*, AIR 1975 Cal 64 ; *Stibbe* v. *Stibbe*, (1931) P. 105.
8. *Jagdish* v. *Manjula*, AIR 1975 Cal6 4.
9. AIR 1929 PC 182.
10. See *Leela* v. *Manoharlal*, AIR 1959 MP 349.

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has to be regulated in appropriate cases by the conduct of the parties. In *Jagdish* v. *Manjula*,[1] it was held that though the conduct of the parties may be a relevant factor in deciding a case of permanent alimony under Section 25 each case has to be decided on its own merits and as the Court is entitled to use its discretion depending on the facts of the case one-third of the admitted net income amounting to Rs. 450 per month can be awarded. If the conduct of the applicant has been condemnable for any of numerous reasons that can be easily imagined, he or she should not have the same generous consideration at the hands of the Court as if his or her conduct had been less blameworthy. In the same way if the conduct of the respondent to the petition has been abhorrent to all moral principles and sentiments of decency and decorum and deserving of no sympathy from the Court, any plea from such respondent for reduction of the maintenance amount asked for will have no favour.

In estimating the respondent's income the possibility of her inheriting property from her relations should not be taken into account.[2] Likewise in assessing the petitioner's income the possibility of his contracting a second marriage with consequent increase in his expenses is not to be considered.[3] The existence of a child of the earlier marriage will however make a difference in the sense that the educational expenses of the child should be deducted in full from the husband's income before arriving at the income available for division between the spouses.[4] The rule of one-third of the husband's income is not absolute.[5] A husband in the wrong cannot argue that the wife should work and earn to relieve him from having to pay maintenance.[6] Nor is there any obligation cast on her when once her marriage has come to an end for no fault of her to earn her living with view to reduce her husband's liability to maintain her.[7] If a lump sum has been ordered in full quit of the maintenance claim the fact that the applicant has dissipated that amount would be no ground for justifying him or her to apply again for maintenance. Though the parties cannot contract out of a statutory right given to them in the interest of public policy and social well-being he or she having received an adequate amount in full discharge of the claim ought not to be allowed to go back on that arrangement.

11. Conduct of the parties. – The phrase 'conduct of the parties and other circumstances of the case' qualify the phrase 'such gross sum or such monthly or periodical sum'. This is more so because sub-clause (3) expressly mentions the type of conduct and account of which the decree of maintenance granted can be varied or rescinded ; and that is limited to re-marriage or not remaining chaste. The conduct mention is sub-clause (1) is not limited to the instance of conduct contained in sub-section (3) i. e. re-marriage or of being unchaste only. Secondly if the decree of divorce is granted on the ground of desertion, wife is not disentitled to permanent alimony but her conduct should

1. AIR 1975 Cal 64.
2. *Lalithamma* v. *Kannan*, AIR 1966 Mys 178.
3. *Subramanyam* v. *Saraswathi*, AIR 1964 Mys 38.
4. *Williams* v. *Williams*, (1964) 3 WLR 832.
5. *Sibbe* v. *Sibbe*, (1931) P. 105 ; *Gengler* v. *Gengler*, (1976) 2 All ER 81.
6. *Rose* v. *Rose*, (1950) 2 All ER 311.
7. *Lalithamma* v. *Kannan*, AIR 1966 Mys 178.

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be considered while determining quantum of maintenance.[1] The application by husband for divorce was filed wherein no application for maintenance was filed by the wife, and the proceeding ended in compromise decree granting divorce and maintenance to wife also. The order of maintenance cannot be challenged in execution of orders of maintenance and the executing Court cannot go behind the decree.[2] A decree for divorce on the ground of desertion on the part of the wife was passed. The wife is not disentitled from claiming permanent alimony and maintenance.[3] The decree of annulment of marriage does not debar the Court from granting alimony to the parties who are otherwise entitled to it.[4] In an application under Section 24 (3) of the Act, it is not necessary that the charge of unchastity must be proved beyond all reasonable doubt. The Court can act on the preponderance of probabilities. The standard of proof is the same as in Civil cases.[5]

In deciding a claim for permanent alimony the party applying must be presumed to be innocent,[6] till the contrary is proved. The conduct of the parties includes not only the conduct of the applicant to the award of maintenance but also the conduct of the respondent against whom such award is asked for.[7] Taking the conduct of the petitioner who happens to be the wife, if it is found that subsequent to the marriage she had thrown to the winds the solemn vows of matrimony and treated the husband with scant courtesy and affection with the result that the husband had been forced to live away from the wife which has occasioned the petition by the wife for judicial separation and the wife after the decree for judicial separation applies for permanent maintenance against the husband, what justification will there be for the Court to consider her case with any sympathy and be generous to her in the award of maintenance ? In such a case she cannot complain if she is given only a bare maintenance confined to the actual necessities of food, raiment and shelter. The fact that the husband is a man of means who can well afford to pay her decent maintenance which enable her to live a life of luxury and case, cannot induce the Court to consider her request to be more liberal in the matter of fixation of the rate of maintenance. Similarly taking the case of a husband who files an application for permanent maintenance against his opulent wife after misunderstanding had arisen between the parties and the husband had to file a suit for any of the reliefs under Section 9, 10, 12 or 13 of the Act, if it is found that in fact and in deed it was the husband that really drove the wife into the arms of another and forced her to immoral ways on account of his negligence and indifference and cruelty to her, no Court will view this application for maintenance with any favour or sympathy. Cruelty of the petitioner, the indifference to the claims of affection and case expected by the other spouse of the marriage, continued life of shame and adultery on his or her part and in

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1. *Umeshchand Sharma* v. *Rameshwari Devi*, AIR 1982 Raj 83.
2. *Jaidevi* v. *Bishan Dass*, AIR 1981 P. & H. 186.
3. *Rajinder Parkash* v. *Smt. Roshni Devi*, AIR 1981 P. & H. 212.
4. *Shri Kuldip Chand Sharma* v. *Geetha Sharma*, (1977) 79 Punj LR 229.
5. *Kamal Tukaram Chaudhary* v. *Ramchandra Laxman*, 1978 Mh LJ 598.
6. *Jagadish* v. *Manjula*, AIR 1975 Cal 64 ; *Harmousji* v. *Dinbai*, AIR 1955 Bom 413.
7. *Clear* v. *Clear*, (1958) 1 WLR 467.

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short conduct that will evoke abhorrence and righteous indignation on the part of any body will be duty considered to whittle down the maintenance allowance that otherwise will be decent and handsome. This is after all another application of the well-known principle embodied in Section 23, namely, that no one should be allowed to take advantage of his own wrong. The position in the ease of an application for permanent maintenance is entirely different from the position in the case of an application for interim maintenance. No doubt in both the matters anybody can apply and the evidence must relate the practically to the same facts and circumstances.

In the case of an application for interim maintenance the investigation should stop with the *prima facie* case presented by either party for the consideration of the Court. In the case of an application for permanent maintenance all the circumstances of past living, the status of the parties, their financial conditions, their means and assets, their ways of life and their place in society and reputation have all to be exhaustively and comprehensively considered and the appropriate quantum of maintenance has to be arrived at. There is also this difference between the two cases. In the case of an application for interim maintenance, it is very rarely and only in exceptional cases that the Court really goes into the question of the conduct of the parties prior to the presentation of the petition. But in the case of an application for permanent maintenance the conduct is statutorily insisted upon as a factor to be considered as virtually affecting the question of quantum. After all in the case of interim maintenance it is a tentative, temporary and provisional fixation not intended to be operative beyond the termination of the main proceedings. But in the case of an applicaction for permanent maintenance, it involves fixation of an amount which is to enure not for a temporary period but during the life of the applicant. With these differences in view the Court has to approach the question of awarding permanent maintenance. The two vital considerations enjoined by the statute being: (1) the means of the parties; and (2) their conduct, an order made without proper advertence to these two considerations will be one that deserves to be upset in the case of an appeal against such order. While a number of decisions have held that where there is a finding of unchastity of the wife in proceedings for matrimonial relief, the wife should not be entitled to maintenance under Section 25.[1] The expression "conduct of parties" is not intended to take away the jurisdiction of the Court absolutely in the matter of awarding maintenance and Section 25 is not intended as a punitive measure but to reform people against whom an order for judicial separation or divorce has been passed.[2] The mare fact of the wife's cruelty that led to the judicial separation between the spouses is not by itself sufficient to disentitle the wife to alimony.[3] In the case of an unchaste wife whose marriage has been dissolved on account of her living in adultery, bare maintenance allowance or starving allowance alone is permissible, and if she is earning her living and is not in a helpless position, even this claim for starving allowance disappears, because the allowance envisaged by this section is made to prevent starvation, and is not claimable as a matter of absolute right irres-

1. *Sachindra Nath* v. *Banamala*, AIR 1960 Cal 575; *Rajagopalan* v. *Rajamma*, AIR 1967 Ker 181; *Sardarilal* v. *Vishano*, AIR 1970 J & K 181; see also *Amar Kanta* v. *Sovana*, AIR 1960 Cal 438; *Raghunath* v. *Rani Eala Dei*, 1972 (1) CWR 717; *Kunhikannan* v. *Malu*, AIR 1973 Ker 273; *Varalakshmi* v. *Hanumantha Rao*, (1978) 1 An WR 32 : AIR 1978 AP 6.

2. *Kunhikannan* v. *Malu*, AIR 1973 Ker 273.

3. *Jagdish* v. *Manjula*, AIR 1975 Cal 61.

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pective of the conduct of the claimant or her financial position.[1] Where it was found that the conduct of the wife was relatively less blameworthy than that of the husband, then, notwithstanding the passing of a decree against her, she can claim as full a maintenance as if a decree had been made in her favour or at least in favour of both parties.[2]

12. Variation or forfeiture of maintenance.—In an application under Section 25 (3) it is not necessary that the charge of unchastity must be proved beyond all reasonable doubt. The Court can act on the preponderance of probabilities.[3] If the wife or the husband re-marries after an order for permanent maintenance in her or his favour then such re-marriage is a ground for cancelling the maintenance awarded, because except in case of divorce and nullity decrees the assumption of the continuance of the earlier marriage which is a condition precedent for the continuance of the liability to pay the maintenance is taken away. Also if the wife, who has obtained the order of maintenance in her favour is subsequently found to be unchaste that is also a ground for the application being made by the husband for cancelling the order of maintenance. Similarly, if the husband has obtained an order for his maintenance at the expense of his wife, and he has sexual intercourse with another woman, such conduct on his part is a ground for the wife to move the Court for cancelling the maintenance order. As regards the husband there is one other matter to be noticed. That is this, the maintenance allowance is conditional only upon the husband not being immoral or not marrying again. If the husband is not immoral but continues to have intercourse with a wife whose marriage with him has not been dissolved, but on account of the subsistence of whose marriage there has been a decree for a divorce under Section 11 or Section 13 at the instance of the wife of the second marriage who, in her petition for nullity or divorce, had been asked to pay maintenance to the husband, there is no question of immorality and in such a case the maintenance order obtained by the husband need not be cancelled. The amount of maintenance fixed by an order under this section is liable to be varied by enhancing it or by decreasing it on account of the change in the circumstances of either party. If at the time of the fixation of the maintenance amount, the party in whose favour it is ordered to be paid was in poor circumstances as he or she might have been but if subsequently the condition of that spouse had vastly improved and he or she is in a position to maintain herself in decent comfort and luxury, there is a change in the circumstances of the applicant and it is open to the respondent to move the Court for either reduction of the rate of maintenance or for rescission of the order altogether. The converse case may also be presented which would entail the increasing of the maintenance allowance. If at the time the maintenance order was made the husband against whom the order has been passed was not in very good circumstances which resulted in a small amount being fixed as the rate of maintenance to be awarded to the wife and subsequently his financial condition improves enormously and the original rate awarded must in the circumstances be considered as poor and miserly, the wife can well petition the Court for increasing the rate appropriately in comformity with the improved condition of the husband. Where a husband's petition for divorce was dismissed without any order on interlocutory petition by wife for her maintenance being passed and on appeal the order of dismissal of the application for divorce was set aside and the divorce petition was remanded for fresh trial it was held that the interlocutory

1. *Amar Kanta Sen* v. *Savana Sen*, AIR 1960 Cal 438 ; See also *Sachindranath Biswas* v. *Banamala Biswas*, AIR 1960 Cal 575.
2. *Trestain* v. *Trestain*, (1950) 1 All ER 618.
3. *Kamal* v. *Ramchandra*, 1978 Mah LJ 598.

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application made by the wife to the trial Court for granting maintenance under Section 25 (1) had ceased to exist merely because the petition for divorce had been dismissed but when the dismissal order was set aside and the matter remanded the wife's interlocutory application automatically revived and there was no need for the wife making a fresh application for obtaining the relief she claimed earlier.[1] If after the maintenance decree, cohabitation by the couple is resumed, such resumption would nullify the decree on whatever ground it was based.[2] Where an application for alimony was dismissed at the time of the passing of the decree it cannot be made subsequently unless there is a change in the circumstances.[3]

13. Maintenance pendente lite and litigation expenses—From what date to be granted.— Where the respondent-wife had moved an application for permanent alimony on October 17, 1979, and the petitioner-husband put in appearance on March 3, 1980 and on his objection the proceedings were stayed. The respondent was paid maintenance *pendente lite* in the divorce proceedings up to June 5, 1981. The proceedings under Section 25 was in the nature of continuation of the main proceedings. It being so, the District Judge rightly exercised the discretion in allowing the maintenance *pendente lite* with effect from June 6, 1981.[4]

14. Application for maintenance.—In a proceeding filed under the Act for divorce or judicial separation or restitution of conjugal rights the respondent-wife in addition to opposing the claim made by the petitioner-husband was entitled to make a counter-claim for any relief under the Act on the ground of petitioner's adultery, cruelty or desertion. Now the relief claimed by the respondent-wife was permanent alimony for herself and for the minor child. That claim fell under Section 25 of the Act. The contention was that the claim made in the application for permanent alimony cannot be considered to be a counter-claim. According to the counsel the counter-claim must be for either divorce or judicial separation or for restitution of conjugal rights, and not for any other relief. It is not possible to accept this contention because Section 23-A of the Act, clearly provides that in a proceeding for divorce, judicial separation or restitution of conjugal rights, the respondent can make a counter-claim for any relief under the Act on the ground of the petitioner's adultery, cruelty or desertion. The contention raised in the application was that the petitioner-husband has treated her with cruelty. Therefore, the claim made in the application for permanent alimony satisfied the requirement of Section 23-A of the Act. That being so, when there was a counter-claim and that counter-claim fell within the scope of Section 23-A read with Section 25 of the Act in such a situation, if the petitioner was allowed to withdraw the main petition it would seriously affect the counter-claim made by the respondent because the counter-claim can be entertained only when there was a proceeding for divorce or judicial separation or restitution of conjugal rights.[5]

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1. *Varlakshmi* v. *Hanumantha Rao*, (1978) 1 An WR 32 : AIR 1978 AP 6.
2. *Ansuya* v. *Rajaiah*, AIR 1971 AP 296.
3. *Susheela* v. *Jagannadhan*, AIR 1964 AP 247.
4. *Chuni Lal Gulati* v. *Krishana Rani*, AIR 1983 Punj & Har 241 at pp. 243-244 : 1983 Hindu LR 34.
5. *C. Sannaiah* v. *Smt. Padma*, AIR 1983 Kant 114 at pp. 115 and 116 : (1982) 2 Kant LJ 41 : (1982) 2 DMC 121.

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15. Divorced wife—Decree for permanent alimony and maintenance—Death of husband—Effect.—While granting a decree for dissolution of marriage the Court had directed that the plaintiff would get permanent alimony and maintenance of Rs. 350/- p. m. from the date of the decree till her death or her remarriage or any other act which would disentitle her from getting the amount. Maintenance was paid up to October, 1972 by the husband who was a pilot in the Indian Airlines. He died on December 18, 1972, leaving behind *inter alia*, an asset of Rs. 2,00,916.00 lying to his credit with his employer. The plaintiff instituted Suit for creation of a charge and also asked for recovery of Rs. 8,750/- claimed to be due as outstanding maintenance until the date of the suit and for an injunction against withdrawal of the money lying with the Indian Airlines until adequate arrangements was made for payment of alimony to her.

The High Court held that the death of the husband did not affect the order for payment of alimony and the same could be recovered from his estate in the hands of the heirs and successors. The Court further held that an independent suit was barred and the plaintiff was not, therefore, entitled to the reliefs claimed. Thereupon wife filed appeal in the Supreme Court.

That appeal was taken up separately as in course of hearing terms of settlement were mooted. The Supreme Court indicated to the counsel for the respondents that even if there be some force in the plea that a separate suit did not lie, the suit could as a measure of *ex debito justitiae* be treated as an execution petition. There is good authority for converting an execution application into a suit and there could be no valid objection to the counter-process of converting a suit into an execution proceeding, particularly when an ill-advised widow would on account of some procedural error be likely to be deprived of the fruits of an order of maintenance.[1]

16. Application under Section 25—Forum—Jurisdiction of Court.—Section 25 of the Hindu Marriage Act, which is a consequential relief to be granted at the time of passing of any decree of substantive relief or at any time subsequent thereto, the application thereunder will have to be filed before the Court exercising the jurisdiction at the time of passing of any decree or subsequent thereto. The phraseology used in Section 25 in the opening clause cannot be lightly brushed aside because it pointedly refers to the Court to which the application for permanent alimony has to be presented.

Even the plain reading of the opening sentence of Section 25 shows that the section itself fixes the forum for the relief of permanent alimony and maintenance to be the same Court which is exercising jurisdiction between the husband and wife at the time of passing of a decree for substantive matrimonial relief or at any time subsequent thereto on an application made to it for the purpose.

Section 25 of the Hindu Marriage Act itself prescribes the forum before which the consequential relief of permanent alimony is to be secured, no reference to Section 19 of the Hindu Marriage Act is necessary, particularly when it only refers to petition under the Act viz. those governed by Section 9 to 13B.

However, the decree for dissolution of marriage has been passed by the Court at Sambalpur and it is that court which at the time of passing

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1. *Smt. Nandarani Mazumdar* v. *Indian Airlines and others*, AIR 1983 SC 1201 at pp. 1201 and 1202.

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a decree or subsequent thereto could also grant the consequential relief of permanent alimony under Section 25 by an application made to it. The Court at Nagpur even though it has original civil jurisdiction to deal with the substantial matrimonial relief, cannot be approached for the consequential relief of permanent alimony under Section 25 of the Act. The Court at Sambalpur alone can deal with that subject in the facts and circumstances of the case.[1]

17. Decree for restitution of conjugal rights in favour of wife—Jurisdiction of the Court to grant permanent alimony. Where the Additional District Judge held that he was of the view that no order for permanent alimony under Section 25 of the Hindu Marriage Act, 1955 can be made in favour of the appellant-petitioner-wife when no decree under Section 9 of the Hindu Marriage Act had been passed in her favour. For the purpose of interpreting the words "at the time of passing any decree or any time subsequent thereto" in Section 25 of the Act, the Additional District Judge had relied upon the commentaries in Mulla's Hindu Marriage Act, 14th Edition, at p.806. It may be noted that Bachawat and Law, JJ., in *Minarani Majumdar* v. *Dasarath Majumdar*,[2] also took the view that an order for permanent alimony or maintenance under Section 25 can be made only when a decree is passed granting any substantive relief under the Hindu Marriage Act and not where the main petition itself is dismissed. But the High Court proposed to reverse the judgment and decree of the Additional District Judge dismissing the appellant petitioner's petition under Section 9 of the Act and to grant her a decree for restitution of conjugal rights. Therefore, the Court has jurisdiction under Section 25 of the Act to order payment of permanent alimony to the appellant-wife.

On the materials on record, it was held that she was entitled to receive permanent alimony from the respondent-husband at the same rate. But in case, there is any change of circumstance, either party would be at liberty to apply to the trial Court for variation, modification or rescinding the order under Section 25 as the said Court may deem just. Therefore, the order under Section 25 shall be deemed to have been made by the trial Court.[3]

18. Jurisdiction of Court—Petition for decree for divorce for permanent alimony. —A reading of Section 19 of the Hindu Marriage Act, clearly shows that every petition under the Act (which will include a petition under Section 25 of the Act as well) has to be presented to the District Court within the local limits of whose ordinary original civil jurisdiction—

(i) the marriage was solemnized, or

(ii) the respondent, at the time of the presentation of the petition resides, or

(iii) the parties to the marriage last resided together, or

(iv) * * *

It is not disputed that the marriage of the parties was solemnized within the jurisdiction of District Court, Jullundur, both the parties are residing within the jurisdiction of District Court, Jullundur, although it is not clear as to

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1. *Jagdish* v. *Bhanumati*, AIR 1983 Bom 297 at pp. 300 and 301.
2. 67 Cal WN 638 : AIR 1963 Cal 428.
3. *Smt. Sandhya Bhattacharjee* v. *Gopinath Bhattacharjee*, AIR 1983 Cal 161 at pp. 165 and 166 : (1982) 1 Cal LJ 318 : (1982) 86 Cal WN 665 : (1982) DMC 59 : 1 (82) Hindu LR 430 : 1982 Mat LR 237.

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where they last resided together. Therefore, it is clear that even for a petition under Section 25 of the Act, the Jullundur Court will have jurisdiction in this matter. Adverting to the phraseology of Section 25, stress is being laid on the words "on application made to it for the purpose". From these words it is sought to be inferred that "it is the Court, which passed the decree, and that court alone is entitled to entertain such application. If this interpretation were to be placed on these words, it will lead o anomalous results as would be clear from the following example. Suppose, a divorce petition is dismissed by the first Court and the dismissal is confirmed by the High Court and the matter goes to the Supreme Court and the Supreme Court grants a decree of divorce. The interpretation sought to be placed on Section 25 of the Act and on the word 'it' would mean that a petition for grant of permanent alimony under Section 25 of the Act will have to be filed before the Supreme Court. Similarly if the divorce petition was declined by the first Court, but was granted by the High Court, the application for the grant of permanent alimony will lie to the High Court. This is not the scope of either Section 25 or conveyed by Section 19 of the Act. Moreover, the opening part of Section 25 shows that the proceedings may be taken before 'any' Court exercising jurisdiction under this Act and the jurisdiction under this Act is exercised in view of Section 19 of the Act on matters arising under the Act. Therefore, the reasonable interpretation to be placed would be that Section 25 or for the matter any other section, should be read subject to Section 19 so far as the jurisdiction of the Court is concerned unless there is a specific provision to the contrary in any particular section. Therefore, on a plain reading of Section 19 and reading it harmoniously with Section 25 of the Act, the only conclusion to be drawn would be that even if a petition for divorce, or any other decree, is granted by one of the Courts having jurisdiction under Section 19 of the Act, it may give cause to the opposite party to move for the grant of permanent alimony or any other relief under Section 26 or 27 of the Act, again the jurisdiction will be governed by Section 19 of the Act and not merely by the passing of a decree by a particular Court.[1]

19. **Agreement.**—A bare reading of Section 25 of the Act discloses that it confers no absolute right on any of the spouses to maintenance or permanent alimony at the time of passing of a decree under the Act. In the given facts and circumstances of a case, the Court may decline to grant the maintenance, if claimed to any of the parties. If that is the legal position or implication of the section then a spouse may for the same very reasons may throw away his or her right to maintenance by entering into an agreement with the other.

The entering into an agreement of the type, the one (R. 1) has been entered into between the parties violates no provision of law nor any public policy. As already indicated, the provisions of Section 25 are only enabling; enabling a Court as well as the applicant to seek maintenance in accordance with the same.[2]

26. Custody of children.—In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of

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1. *Smt. Darshan Kaur* v. *Malook Singh*, AIR 1983 P & H 28 at p. 30.
2. *Manjit Singh* v. *Mrs. Savita Kiran*, AIR 1983 P & H 281 at p. 282 : 1983 Marriage LJ 150 ; (1983) 85 Punj LR 261.

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minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also, from time to time revoke, suspend or vary any such orders and provisions previously made.

SYNOPSIS

1. Scope.
2. Principles underlying orders to be made.
3. Maintenance.
4. Beneficial provision—Petition under Section 24 by wife for herself and child, but no petition under Section 26 - Maintenance to the child —Effect.

1. **Scope.**—This section provides for the Court making suitable order for the custody of the children of the parties in any proceeding under this Act, and empowers the Court to pass such interim orders as to their custody, maintenance and education as may be just and also orders subsequent to the decree with reference to such matters. The orders contemplated by the section depends on the following requisites being fulfilled ; (a) The application must be made in any proceeding under the Act, and (b) it must relate to minor children ; and may be made, varied, suspended, revoked from time to time and even after termination of the proceedings and passing of any decree as if the proceedings were still proceeding. The primary and paramount consideration for the Court in making any orders under this section would be the walfare of the minor. The expression 'minor children' used in this section will include children either born of the marriage or born to the parties prior to the marriage, or born of marriages which had been declared a nullity, or avoided by a decree of nullity or dissolved by a decree of divorce. In the case of children belong into only one of the parties by a prior marriage, this section is not intended to apply, because in such a case there is not going to be any question of the custody of those children, because they must be in the custody of the parent to whom they belong. When by adoption either of the parties has a child, that also will be included the expression 'minor children' unless it be that the adoption was made by the wife prior to her marriage, as she well may under the Hindu Maintenance and Adoptions Act. It may happen that children born to either of the party prior to the marriage in question, might have been living with the parties and treated by both of them as members of the family. Since by the rift between the parties some provision has been made for the custody, maintenance and education of those children also, it does not appear to be an unreasonnable construction of the word 'children' to make it include such children also, though normally the order should be that those children should be in the custody of the person to whom they belong. The proceeding in which the order as to custody is to be passed may be any proceeding for any of the reliefs provided for under the Act for a matrimonial offence, such as, for restitution of conjugal rights, judicial separation, nullity of marriage or divorce. Under Section 26 a jurisdiction to pass orders with respect to the custody, maintenance and education of minor children, continues even after the main proceeding initiated under the Act has come to an end. These orders are essentially in the

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nature of interim orders and are liable to be modified, revoked or suspended if there be a change in the relevant circumstances of the parties.[1] Even where the decree in the main petition provides for it the Court does not become *functus officio* but is entitled, on application made by either party by petition, to make further or other orders for the custody, maintenance and education of children as if the Court still continuous to be seized of the main proceeding. It is obvious that this section is intended to serve a very necessary purpose when the parents are wrangling in the Court, namely, the maintenance and education of children should not be made to suffer due to the misunderstanding between the parents. Section 26, Hindu Marriage Act, gives a complete discretion to the Court to make such orders as it may deem just and proper, and whenever a marriage is dissolved or an order for judicial separation is made, it becomes the duty of the Court to take into consideration the welfare of the children which is of permanent importance as owing to the natural conflict and controversy between the parents it often becomes difficult to apply any other test for deciding as to who should have the custody. Even if the matter were to be considered under the Hindu Adoptions and Maintenance Act, 1956 and the Guardians and Wards Act of 1890, the consideration that must p evail with the Court in a matter of custody of a minor is the one of welfare of the minor. Under the Hindu Marriage Act, 1955, there can be no doubt that that would be the only consideration and that no other consideration shall prevail with the Court.[2] Ordinarily unless there are special circumstance under Section 6, Hindu Minority and Guardinship Act, mother is the natural guardian of her daughter below 5 years of age.[3] The non-mention of Section 26 does not affect substance of the prayer made for maintenance of the child under Section 25.

2. Principles underlying orders to be made.—Where there is a provision in a decree for custody, maintenance and education, the rule that once a decree is made it is unalterable except on review on appeal does not apply. The reason probably is that the decree in the main matrimonial cause deals with the matrimonial offence and it is only an incidentally that it embodies a provision for custody of the children. This section enacts only an optional provision which may availed of by either of parties and does not bind them to have the proper custody of minor children determine only by the matrimonial Court.[4] There is nothing to prevent them from resorting to the ordinary Courts of the country for the determination of proper custody of minor children, and protection of their property, if any. In dealing with an application under Section 26, in the case of a Hindu, the Court should be guided by the considerations undertaking the Hindu Minority and Guardianship Act, 1956.[5] Subject to the provisions of the later Act, regard may be had to the following

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1. *Munoswani Rajoo* v. *Hamsa Rani*, (1974) 2 MLJ 537 : AIR 1975 Mad 5.
2. AIR 1960 Punj 326 : 62 Punj LR 354.
3. *Smt. Radha Bai* v. *Surendra K. Mudaliar*, AIR 1971 Mys 69 ; *Smt. Chander Prabha* v. *Prem Nath Kapoor*, AIR 1969 Delhi 283.
4. *Avinash Devi* v. *Khasan Singh*, AIR 1960 Punj 326.
5. *Chandra Prabha* v. *Prem Nath*, AIR 1969 Delhi 283 ; *Radha Bai* v. *S. K. Mudaliar*, AIR 1971 Mys 69 ; *Gessi* v. *Shriram*, AIR 1972 Raj 256.

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principles. The interest and welfare of the child is the paramount consideration with the Court.[1]

A petition by wife for appointment of guardian of minor child was dismissed as she was living in adultery. The dismissal order does not operate as *res judicata* so as to bar the Court from making order under Section 26 as to custody of minor child. The Court has jurisdiction to make an order for custody of illegitimate child under Section 26. The custody of child below 5 years was ordered to be with the mother who was drawing a substantial salary and the father had no means to look after the child. The order directing custody of child to be with the mother was held proper.[2]

Prima facie the innocent party is entitled to the custody of the minor child.[3] The controlling consideration however is the welfare of the minors and not the right of their parents.[4] The welfare of the minor comprehends moral and religious welfare as well as the child's physical well-being and due regard must be had to the ties of affection.[5] Where the father had married a second time, the mother, the first wife was appointed guardian of her female child aged about two and a half years and given custody till the child attained eighteen years with liberty to the father to take the child to his house for three days in every quarter and in addition to visit the child in her mother's house at all convenient times.[6] Where the mother had brought up the minor children showering maternal affection on them while the father remained compeletly indifferent to their welfare it was held that it was for the welfare of the minors that they should be brought up by the mother.[7]

In making the order for the custody, maintenance and education of the children, in addition to the wishes of the parties to the proceeding, the wishes of the minor children also have got to be consulted and considered.[8] No doubt if they are too young to have wishes of their own and such wishes as have been expressed by them are really the wishes of either of the parents who have influence over them, the Court will have to take an over all picture of all the circumstances and come to decision as will serve the interest of the children. The principles applicable under the Guardians and Wards Act in such matters may well be invoked for coming to a just conclusion in application under this Act.[9]

3. Maintenance.— Section 26 vests a discretion in the Court to make an order for maintenance of children *pendente lite* on application made for the

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1. *Saraswati* v. *Dhanakati*, 47 MLJ 614 : 48 Mad 239 : AIR 1924 Mad 873 ; In re *Gulbai and Lilbai*, ILR 32 Bom 50 at p. 54 ; See also *Rosy Jacob* v. *Jacob Chakramakkal*, AIR 1973 SC 2090.
2. *Ravur Venkata Subbaiah* v. *Smt. Meruga Kamalamma*, AIR 1982 AP 369 : 1982 (2) Cr LJ 76.
3. *Makinlay* v. *Mackinlay*, AIR 1932 Oudh 182.
4. *Rosy Jacob* v. *Jacob Chakramakkal*, AIR 1973 SC 2090.
5. *Saraswati* v. *Dhanakoti*, 47 MLJ 614 : 48 Mad 239 : AIR 1924 Mad 873.
6. *Kaliappa Goundan* v. *Valliammal*, AIR 1949 Mad 605.
7. *Valerie* v. *Mervyn*, AIR 1975 Mad 322.
8. *Saraswati* v. *Dhanakoti*, 47 MLJ 614 : 48 Mad 239 : AIR 1924 Mad 873 ; *In the matter of L. J. Patel*, AIR 1944 Cal 433 ; See also *Venkatarama Ayyangar* v. *Thulsi Ammal*, AIR 1950 Mad 320.
9. *Avinash Devi* v. *Dr. Khasan Singh*, AIR 1960 Punj 326.

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purpose.[1] Even while granting maintenance *pendente lite* to the wife or husband as the case may be regard should also be had to Section 26 and in the application for interim maintenance by the wife under Section 24, the Court can grant relief to the children also under Section 26 in a proper case.[2] Where the amount needed for the child's maintenance has not been included in fixing its mother's alimony she may see the child's maintenance in separate proceedings.[3] The fact that the minor child is living with his mother is not a ground by itself for refusing him relief by way of maintenance and it is wrong to presume that unless the father can spare some money after maintaining himself, his aged mother and his brother he has no legal obligation to maintain his own minor son of course in accordance with his status and standard.[4]

4. Beneficial provision—Petition under Section 24 by wife for herself and child, but no petition under Section 26—Maintenance to the child—Effect. —The requirement of the husband or the wife would also include the expenses required for the maintenance of the child. The interpretation of the provisions should not be too literal ; but purposive and functional. As the provisions contained in Section 26 would go to indicate, the court is empowered to pass interim orders as it may deem just and proper with respect to maintenance of minor children. Section 6 operates also during the pendency of the proceeding under the Hindu Marriage Act. So assuming that the provisions contained in Section 24 *stricto sensu* do not authorise grant of maintenance to child. Section 26 authorises the grant of *pendente lite* maintenance by way of interim orders during the pendency of the proceeding. If the petition contains the averments, notwithstanding the fact that the petition for maintenance *pendente lite* is not made under Section 26, but only under Section 24, the court is empowered to grant maintenance under Section 24 or under Section 24 read with Section 26 of the Act.

The provisions contained in Sections 24 and 26 were beneficial provisions and literal interpretation would be unsound. On an application claiming maintenance for the husband or the wife, as the case may be, and for the child, maintenance can be granted to the child howsoever labelled the petition may be. The substance matters, not the from. If there be authority under the provisions, there is end of the matter.

The Court would not have refused maintenance to the child of the provisions contained in Section 26 of the Act had been brought to its notice. If the application was labelled as one under Section 24, the present to (sic) the necessary averments claiming maintenance for the child, the same can be treated as one under Sections 24 and 26 of the Act.[5]

27. Disposal of property.—In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or

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1. *Baboolal* v. *Prem Lata*, AIR 1974 Raj 93.
2. *Appa Rao* v. *Paradasamma*, (1974) 2 An WR 359 : (1974) 2 APLJ 159.
3. *Patel Dharmshi Premji* v. *Bai Sakar Kanji*, 8 Guj LR 888 : AIR 1968 Guj 150.
4. *Ashish* v. *D. C Tewari*, AIR 1970 Delhi 98 at p. 101.
5. *Mahendra Kumar Mishra* v. *Smt. Snehalata Kar*, AIR 1983 Orissa 74 at pp. 75 and 76 : 1982 East LR 437.

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about the time of marriage, which may belong jointly to both the husband and the wife.

SYNOPSIS

1. Scope and applicability.
2. No direction in respect of exclusive property—Use of inherent power.
3. Stridhana property and joint property of the spouses.

1. Scope and applicability.—This section empowers the Court to make in any proceeding under this Act, adequate provision with respect to property presented at or about the time of the marriage which may belong jointly to both the husband and wife. Before an order is made under Section 27, it must be shown that the property in respect of which a claim is made was presented at or about the time of marriage. The word 'at' must necessarily mean the actual time of marriage ; and the words 'about the time of marriage' mean near or round about the time of marriage, which may either be prior to or after, but it must be near or round about the time of marriage and the presents covered by Section 27 are not the presents subsequently made. Care must be taken not to confuse presents made at or about the time of marriage with presents subsequently made. The line which divides them may at times be very thin : nevertheless the distinction is real and substantial, and if overlooked, will lead to the making of a wrong order. The matrimonial Court does not get jurisdiction to make order in respect of the property presented subsequent to the marriage.[1] The section does not exclude the general power of Court to pass an appropriate decree in regard to the property belong in exclusively to either the husband or the wife.[2]

The principles underlying Section 27 are : (1) The proceeding must be a matrimonial proceeding pending under the Act and an application for the disposal of property must be made before the decision in the proceeding. (2) It is not incumbent on the Court to make provision in the decree with regard to the disposal of property and it is left to judicial discretion. (3) The provision so made should be just and proper having regard to the adjustments of the parties and considering all material circumstances. (4) The order should cover only that property which was presented at or about the time of marriage i. e., presented at the marriage as well as prior to or after the time of marriage in close proximity thereto. (5) The property so presented may belong to the wife or the husband or both. (6) At the time the Court has to exercise discretion the property may belong jointly to both the spouses. The term 'belong' does not affect title to the property in the sense of ownership. It only connotes connection will the property. Section 27 provides for the sharing of the property which the spouses received individually or collectively as presents at or about the time of marriage and came to be used by them in their day to day living and thus belonging to them for the purpose.[3]

Where in a petition for divorce the wife's case was that the goods in question belonged to her alone and had wrongfully been detained by her husband, the claim for the return of the goods would be beyond the scope of the proceedings under Section 13 read with Section 27 as an order under Section

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1. *M. D. Krishnan* v. *M. C. Padma*, AIR 1968 Mys 226.
2. *Kamta Prasad* v. *Omwati*, AIR 1972 All 153.
3. *Surinder Kaur* v. *Madan Gopal Singh*, AIR 1980 P & H 334.

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27 can be made only in respect of property "presented at or about the time of marriage which may belong jointly to both husband and wife.[1]

The expression words of Section 27 referred to property which may belong jointly to both the husband and the wife. It nowhere says that all the wife's property belongs jointly to the couple or that 'Stridhan' is abolished and she cannot be the exclusive owner thereof. The status expressly recognises that property which is exclusively owned by the wife is not within the ambit of Section 27. The articles of dowry given to wife exclusively, is owned by wife.[2]

2. No direction in respect of exclusive property—Use of inherent power. — There is nothing in Section 27 which debars the Court from making an enquiry into a dispute whether or not the property is jointly owned by the parties, or whether or not it is such as was presented to them at or about the time of their marriage. But the section excludes by necessary intendment, its application to the property, which the party seeking a direction from the Court, claims that it exclusively belongs to it. But for the provisions of this section, it cannot be gainsaid that the parties could not have got their claims settled in respect of the property jointly owned by them, except by filing a regular suit. This section no doubt provides for a speedy and cheap remedy to that extent, but its perimeters cannot be extended to include even the property belonging exclusively to one of the parties. It cannot be said that even if the section does not specifically apply to exclusive property of the litigating spouses, the Court can still make provision in respect of such property in the decree in the main proceeding, in exercise of its inherent power under Section 151, C. P. C. Inherent power cannot include a power similar to the one conferred by Section 27, even though this section in terms does not apply to exclusive property. Nor can inherent power be invoked where the party has an alternative remedy of suit for obtaining the appropriate relief.

Where the party fails to raise the claim in the main pleading, either before or after its amendment, the Court must necessarily decline to exercise its discretionary power under Section 27 in its favour, leaving it to agitate the same in a regular suit. No direction for amendment of the main pleading can, however, be given in the instant case, as the main petition itself stands finally disposed of.[3]

3. Stridhana property and joint property of the spouses.—Any property gifted to a girl at the time of her marriage by her parents or by other was her "Stridhan" property and that she has an exclusive title to that property. Section 27 expressly confers jurisdiction upon the Civil Court to make such a provision in the decree in respect of any property which may belong jointly to both husband and wife. It does not enable the Court to make any provision in the decree in respect of property which may exclusively belong either to the husband or the wife. Since the Act, in absence of Section 27, does not exclude the jurisdiction of the Court to provide, in the decree, for exclusive or joint property of the spouses, the Court has the jurisdiction to made such a provision in the decree even if Section 27 was not on the statute book.[4]

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1. *Santosh Anand* v. *Anand Prakash*, 1980 AWC 157.
2. *Vinod Kumar Sethi* v. *State of Punjab*, AIR 1982 P & H 372 (FB).
3. *Sardar Surinder Singh* v. *Manjeet Kaur*, AIR 1 83 J & K 86 at p. 88: (1983) 1 Ren C J 88 : 1983 Kash LJ 93.
4. *Suryakant Ra ilal Oza* v. *Jashumoti d/o Manishanker Muljibhai Trivedi*, 1982 (1) Civi LJ 254 at pp. 256-59 (Guj).

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[1][28. **Appeals from decrees and orders.**—(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order].

SYNOPSIS

1. Scope.
2. Appeal.
3. Limitation.
4. "Proceedings under the Act".
5. Dismissal of divorce petition under Section 3 (1) (i)—Appeal by husband under Section 28 Validity.
6. Decree for dissolution of marriage Appeal by wife—Remarriage of husband—Effect.
7. Petition for divorce —Appeal—Valuation—Jurisdiction of Court.

1. **Scope.**—The words 'decrees and orders made by the Court' in Section 28 include not only original decrees and orders but also appellate decrees and orders.

Hence, provision enacted in the second part of Section 28 makes such decrees and orders appealable. A right of second appeal is conferred by Section 28 but that right of appeal is limited to the grounds set out in Section 100 of C.P.C. and can, therefore, be exercised only on question of law and not question of fact. The decision under Section 10 is not decree within the meaning of Section 2 (2), C.P.C.[2] The Letters Patent Appeal against High Court decision is maintainable and High Court can interfere with finding of fact of Single Judge but not lightly. It cannot however interfere in appeal where leave is granted [3]

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1. Section 28-A Subs. by the Marriage Laws (Amendment) Act, 1976.
2. *Bai Umiyabhen* v. *Ambalal Laxmidas*, AIR 1966 Guj 139.
3. *Dr. H. T. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235.

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Section 28 (1) provides that all decrees passed by the Court in any proceeding under the Act are appealable to the Court to which an appeal lies from the decisions of the Court in the exercise of its original civil jurisdiction. No appeal will however lie on the subject of costs only by reason of Section 28 (3). The provision for filing a second appeal even after the substitution of Section 28 by Act LXVIII of 1976 continues to be Section 100, Civil Procedure Code and a second appeal will lie only on the ground provided for in that section.[1] In a proceeding under the Hindu Marriage Act the Court may have to pass orders other than under Sections 24, 25 and 26.[2] The provision regarding appeals from orders in Section 28 (2) is confined to only orders of a permanent nature under Sections 25 and 26. So with respect to interim orders or any order other than one of a permanent nature under Sections 25 and 26 there is no appeal. No appeal is contemplated under the amended law against an order under Section 24 of the Act. What has not been expressly included in the new section must be implied to have been excluded. Therefore no appeal lies now against an order under Section 24.[3] The plain language of the provisions of Section 19 of the Marriage Laws (Amendment) Act (LXVIII of 1976) clearly shows that an appeal now lies only against three kinds of orders under the Act, namely (i) where a decree is passed ; (ii) where a final order is made in respect of permanent alimony under Section 25 or (iii) for the custody of minor children under Section 26. The right of appeal is not an inherent right, but is a statutory right which can be conferred only by law enacted by a competent Legislature. The right of appeal having been restricted by Section 19 of the Amending Act, the right originally residing in any person aggrieved by an order under Section 24 of the Act to prefer an appeal against the same has now been taken away.[4] Prior to the substitution of the present Section 28 some decisions had held that a revision from an interlocutory order the Act was competent under Section 115, Civil Procedure Code. But in view of the insertion of a proviso to Section 115 by the Civil Procedure Code (Amendment) Act of 1976, such revision is no longer competent. It may be that under Article 227 of the Constitution a Court may, in special circumstances interfere. Section 28 only indicates what can be appealed against but not who can appeal. This would be a matter governed by general principles.[5] The amended provisions of the Act apply to pending appeals by reason of Section 39 of the Marriage Laws (Amendment) Act, 1976.[6] A second appeal against an appellate order to the High Court is maintainable.[7]

2. Appeal.—The forum of appeal depends on the law for the time being in force in that respect.[8] Where the decree is of the Court of a Civil Judge senior division, which Court had been notified by

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1. *Indraj* v. *Shanti*, AIR 1978 All 297.
2. *Udal Narsin* v. *Kusum*, AIR 1975 All 94.
3. *Narain Singh* v. *Rukmani*, AIR 1977 HP 93 ; *Gurbaksh Singh* v. *Taranjit*, AIR 1977 HP 66.
4. *Satish Bindra* v. *Surjit Singh Bindra*, 79 Punj LR 384 : AIR 1977 P & H 383.
5. *Tara Singh* v. *Shakuntala*, AIR 1974 Raj 21.
6. *Sundari Dasi* v. *Basudeo Lal*, AIR 1977 Cal 193 ; *Radheshyam* v. *Laxmi Bai*, AIR 1977 MP 271.
7. *Gurbachan Singh Kaur* v. *Sardar Swaran Singh*, 1978 All LJ 284.
8. *Ambi* v. *Pundalik*, AIR 1960 Bom 521 ; *Mallappa* v. *Mallava*, AIR 1960 Mys 292 ; *Gangadhar* v. *Manjula*, AIR 1966 Bom 42 ; *Kalawati* v. *Devi Ram*, AIR 1961 HP 7.

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the Government under Section 3 (b) as having jurisdiction in respect of matters under the Hindu Marriage Act, appeal from such decree lies to the District Court.[1] In the absence of any such notification, where a petition under the Act is decided by the Additional District Judge who forms part of the District Court, appeal from his decision will lie to the High Court.[2] Reading Section 28 of the Hindu Marriage Act and Section 15 of the Madras City Civil Court Act together, it is clear that if a petition under the Marriage Act had been disposed of either by the principal Judge of the City Civil Court or by the Additional Judge of that Court, an appeal will lie straightaway to the High Court ; if however it is disposed of by an Assistant Judge of the Court an appeal will lie only to the principal Judge.[3] The expression 'decree made' in Section 28 means decree granting or refusing relief. An appeal by the husband against an order dismissing a petition under Section 9 is maintainable under Section 28.[4] An appeal being a creature of statute and there being no provision in Section 28 in that behalf in respect of an order under Section 24, such an appeal would be incompetent.[5] An order staying the proceedings in a divorce petition until the application under Section 24 of the Act, is disposed of is not open to appeal.[6] A decree passed by Small Causes Acts as 'District Court' and hence appeal and not revision against the decision under Section 3 (b) is maintainable.[7] In divorce petition, application under Section 24 for interim maintenance and expenses, if ordered by the Court *pendente lite*, is not appealable but revision lies. Though Section 24 in terms refers only to the wife or husband making an application, the Court has got power under Section 26 to make interim order in respect of maintenance of minor children also.[8]

The finding of fact arrived at by the first Court after appreciation of the evidence should be reversed only when the evidence taken as a whole cannot reasonably justify the conclusion arrived at or when there is an element of improbability arising from proved circumstances which in the opinion of the Court outweighs such finding.[9] The scope of interference, according to the Supreme Court is as follows : "If in giving the finding the Court ignores such an important piece of evidence, and other pieces of evidence which are equally important are shown to have been misread and misconstrued and this Court comes to the conclusion that on the evidence taken as a whole no tribunal could properly, as a matter of legitimate inference, arrive at the conclusion

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1. *Valliammal* v. *Periaswamy*, AIR 1959 Mad 510 ; *Dhulappa* v. *Krishnabai*, AIR 1962 Mys 172 ; *Mallappa* v. *Mallava*, AIR 1960 Mys 292 ; *Gangadhar* v. *Manjula*, IR 1966 Bom 42 ; See also *Kalyan Singh* v. *Tej Kumar*, AIR 1961 Punj 480 ; *Harilal* v. *Lilawati*, AIR 1961 Guj 202.
2. *Ambi* v. *Pundalik*, AIR 1960 Bom 521.
3. *Balai Singh* v. *Raj Kumari*, (1972) 2 MLJ 53 : 85 LW 16 : AIR 1972 Mad 278.
4. *Darshan Singh* v. *Mst. Daso*, AIR 19 0 Raj 102.
5. *Rajpal* v. *Dharmavathi*, AIR 1980 All 350 ; See also *Ram Narayan Pathak* v. *Urmila Devi*, AIR 1980 All 344.
6. *Dhanirum* v. *Smt. Sushila Devi*, AIR 1977 HP 83.
7. *Chandra Swaroop Sinha* v. *Smt. Manorama Sinha*, AIR 1981 All 230 (DB).
8. *Smt. Subhasini* v. *Umakanth*, AIR 1981 Kant 115.
9. *Gurmeet Kaur* v. *Nariinder*, 80 Punj LR 207.

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that it has, interference by this Court will be called for.[1] But where the question is not of credibility of witnesses based entirely on the demeanour but a question of inference from facts, the Court of appeal is in as good a position as the trial Court and is free to reverse its finding if it thinks that the inference made by the trial Judge is not justified.[2] The scope of an appeal under this section is the same as under the Civil Procedure Code and hence in a second appeal there can be no interference with findings of fact.[3] An appeal from an adjudication under Section 9, 10, 11 or 13 of the Act should be treated as a Civil Miscellaneous Appeal and not as a regular appeal under Section 96 of the Civil Procedure Code. Though such adjudication is regarded as a decree, it is only for the purpose of the particular section above-mentioned and having been given in a proceeding not stated with the presentation of a plaint it cannot be regarded as a decree for the purpose of Section 96, Civil Procedure Code.[4] In the case of *Vathsala* v. *Manoharan*,[5] it was held that where an *ex parte* order of nullity of marriage was passed it was subject to the result either of an application to set it aside or an appeal preferred against it and a marriage contracted after the *ex parte* decree would not be valid if the *ex parte* decree was subsequently set aside.[6] An Appeal under Section 15 of the Letters Patent is maintainaole under Section 28 against the decision of a single Judge of the High Court on appeal from the decree of the City Civil Court.[7] After the amendment of 1976 appeal lies in the case of orders only if they are orders made under Section 25 or 26. However, even under this section, if any interim order is made, it is not appealable. No appeal lies against orders made under any other section of the Act for right of appeal must be conferred by Act. Interim order passed under Section 26 would be obviously similar to the one made under Section 24 in relation to the wife or husband. The Court may pass interim orders with regards to maintenance and education of minor children.[8] Appeal against decree of divorce should be decided on merits, even if respondent died pending appeal and the appeal does not abate.[9]

3. Limitation. - Section 23 (4) provides a period of limitation of thirty days for an appeal from the date of the decree or order. Appeals from decrees and orders under the Act are not excluded from the operation of the Limitation Act.[10] The limitation of thiry days in Section 28 (4) as it now stands is applicable only to first appeals.[11] The limitation for a second appeal would be the

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1. *Emest White* v. *Kathleen O. White*, 1958 SCJ 839.
2. *Koushulya* v. *Wasakhi Ram*, AIR 1961 Punj 521 and *Radha Prasad* v. *Gajdhar*, AIR 1960 SC 115.
3. *Jivubai* v. *Ningappa*, AIR 1963 Mys 3.
4. *Varalakshmi* v. *Veerredi*, AIR 1961 AP 359.
5. AIR 1969 Mad 405.
6. See also *Chandra Mohini* v. *Abinash Prasad*, AIR 1967 SC 581; *Mohan Murari* v. *Kusum Kumar*, AIR 1965 MP 194.
7. *Dr. Vira Reddi* v. *Kistamma*, AIR 1969 Mad 235 : 81 LW 490.
8. *Narendra Kumar Mehta* v. *Smt. Suraj Mehta*, AIR 1982 AP 160.
9. *Kamalabai* v. *Ramdas Ingle*, AIR 1981 Bom 187.
10. *Chander Dev* v. *Rani Bala*, AIR 1979 Delhi 23.
11. *Indraj v. Shanti*, AIR 1978 All 279; *Surjit Kaur* v. *Tarsen Singh*, (1977) 79 Punj LR 667.

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same as for any other second appeal, namely ninety days.[1] Though the Marriage Laws (Amendment) Act, 1976 curtails the period for filing an appeal, the applicability of Section 5 of the Limitation Act to appeals under Section 28 is not excluded.[2] In calculating the limitation period of thirty days for an appeal under the Hindu Marriage Act the appellant will be entitled to exclude the period spent in obtaining a copy of the decree.[3] If the purpose of Section 28 (4) was to stop time running in case a copy of the decree was not supplied free of cost as contemplated in Section 23(4) the legislature would have expressly provided for the same in Section 28 (4). If the concerned party does not ask for a copy of the divorce decree as contemplated in Section 23 (4) the non-furnishing of the same free of cost by the Court does not save the party from the applicability of the law of limitation prescribed for filing the appeal under Section 28 (4) within a period of thiry days from the date of the decree of divorce.[4] Appeal arising from the proceeding which was pending at the date of commencement of Amendment Act. But was decreed after such commencement in view of Section 39 (1) (i) of the Amended Act, 1976. Appeal would be governed by amended Section 28 (4). The period of limitation of thirty days prescribed by Amendment of Act and original period of ninety days under Limitation Act, 1963 would be applicable.[5]

4. **"Proceedings under the Act".**—Section 28 (2) of the Act if read in isolation does give an impression that its construction is suggestive that proceeding under Section 25 are not proceedings under the Act'. It would, however, be wrong to rely exclusively on the construction of Section 28 (2) for recording a finding that Section 24 has no application to proceedings under Section 25 of the Act. In view of the fact that provision for permanent alimony is incidental to the granting of a decree for divorce etc., and the proceedings under Section 25 are in the nature of continuation of the main proceedings, it would be just to hold that proceeding under Section 25 are 'proceedings under the Act' in the context of the application of Section 24 thereto.[6]

5. **Dismissal of divorce petition under Section 13 (1) (i)—Appeal by husband under Section 28—Validity.**—It would be an injustice to the respondent-wife if the appeal is heard in the absence of a counsel for her. The order directing the appellant to pay litigation expenses and maintenance to the respondent-wife under Section 24 of the Hindu Marriage Act was in the nature of a step for the prosecution of the appeal. As the appellant has not complied with the said order, the appellant-husband cannot be heard in support of his appeal. The appeal was accordingly dismissed.[7]

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1. *Indraj* v. *Shanti*, AIR 1978 All 279.
2. *Kantibai* v. *Kamal Singh*, AIR 1978 MP 245.
3. *Chander Dev* v. *Rani Bala*, AIR 1979 Delhi 23.
4. *Surjit Kaur* v. *Tarsen Singh*, (1977) 79 Punj LR 667.
5. *Mrs. Debi Bhaduri* v. *Kumarji Bhaduri*, AIR 1980 Cal 1 (FB).
6. *Chuni Lal Gulati* v. *Krishna Rani*, AIR 1983 Punj & Har 241 at p. 243 : 1983 Hindu LR 34.
7. *Ram Narain* v. *Smt. Daropdi Devi and another*, AIR 1983 Del 346 at pp. 346 and 347 : 1983 Rajdhani LR 4 : (1983) 4 Del Rep. J. 79 : (1983) 1 DMC 153.

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6. Decree for dissolution of marriage—Appeal by wife—Remarriage of husband—Effect.—In the instant appeals the question was whether the time for filing them had expired by 18th August 1980, when the husband re-married. If the appeals was in time, by re-marriage of the husband those cannot become infructuous. There is no doubt that a decree of divorce breaks the marital ties but during the pendency of the appeal against the decree or during the time it can be preferred the parties are not competent to cotract another marriage : their incapacity to do so is absolute. The further contention that as a copy of the decree dissolving the marriage was to be provided free of cost to the parties, therefore, time spent in obtaining its certified copy was not to be excluded has also no force.

There is no controversy that if the time spent by the appellant in obtaining certified copy of the judgment and the decree is excluded, then those appeals filed on 5th Sept. 1980 are within time. Therefore, there is no merit in the preliminary objection. The appeals are maintainable.[1]

7. Petition for divorce—Appeal—Valuation—Jurisdiction of Court.—Originally, the petition valued at Rs. 300 was filed befere the Court of Civil Judge, Senior Division. Even the issues were framed by that Court. Subsequently, at the stage of evidence the case was transferred by the District Judge to the Third Extra Assistant Judge. Obviously, this was done in terms of the powers vested in the District Judge by Section 16 of the Bombay Civil Courts Act, 1869.

The letter and spirit of last portion of Section 16 of the Act of 1869 is that against decision of all matters specified in the first part including suits of valuation upto Rs. 25,000 appeal lies to the District Judge and appeal against decision in suits of more valuation referred to Assistant Judge by the District Judge, lies to the High Court. There was no other way to reconcile last part of the provision not only with the first part but also with the whole purpose and scheme of the Act. Thus in the present matter which is not a suit much less of value exceeding Rs. 25,000 appeal was rightly entertained by the District Judge, though for slightly incorrect reasons. The fact that in certain matters the Assistant Judge was well as District Judge has co-ordinate jurisdiction will have no bearing on the question in view of specific provisions of Section 16. There is also nothing novel about the concept of empowering one Court with appellate powers against the decision of another Court operating upon some area with equal authority.[2]

[3][28-A. **Enforcement of decrees and orders.**—All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced.]

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1. *Mrs. Suresh [Bala Dehradum* v. *Major Gurmohinder S. Bala, New Delhi*, AIR 1983 Delhi 230 at p. 232 : (1983) 1 DCM 45 : (1983) 4 Delhi Fep J 53 : (1982) 22 DLT 326 : (1982) 3 Com LJ 185.
2. *Bhaskar Pandurang Mahatma* v. *Meerabai Bhaskar Mahatma*, 1983 (1) Civi LJ (Bom) 174 at pp. 178, 179.
3. Section 28-A inserted by Marriage Laws (Amendment) Act, 1976.

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SYNOPSIS

1. Scope and applicability.

2. Unconditional withdrawal of divorce petition by husband—Disposal of wife's application for interim maintenance—Legality.

1. Scope and applicability.— A decree for restitution of conjugal rights may be executed under Order 21, Rules 32 and 33, Civil Procedure Code. Orders under Sections 24 and 25 may be executed under Order 21, Rule 30 of the Code. An order granting alimony *pendente lite* cannot only be executed by the wife, but when the payments are made a condition precedent for the taking up of the trial of the petition or of the hearing of the appeal, and the order is not complied with, the petition or the appeal may be dismissed.[1] Where an order is made under Section 24 for expenses and maintenance, the fact that the main petition itself is withdrawn by the person against whom that order was made would not bar the enforcement of that order by execution.[2] Where the husband is directed to pay maintenance to the wife under Section 24 and the maintenance falls into arrears, the Court can enforce obedience to that order by stopping further proceedings started by the husband.[3]

2. Unconditional withdrawal of divorce petition by husband—Disposal of wife's application for interim maintenance—Legality.— Section 28-A of the Act provides the procedure for enforcement of decrees and orders passed by the court in any proceedings under the Act and by virtue of Section 28-A an order passed under Section 24 of the Act can be enforced as a money decree. Of course, if the order under Section 24 is passed during the perdency of the main petition and the same is disobeyed, in addition to the enforcement of the order as a money decree by virtue of the provisions of Section 28-A the court could stay the proceedings in the main petition, strike out the defence of the defaulting party or dismiss the main petition as it may consider appropriate in the circumstances of the case. There can be no doubt that it is imperative that an application under Section 24 of the Act should be decided in any event before the disposal of the proceedings in the main petition under the Act.[4]

Savings and Repeals

29. Savings.—A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enact-

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1. *Mahalingam Pillai* v. *Amsavalli*, (1956) 2 MLJ 289.
2. *Krishnan* v. *Thailambal*, (1969) 1 MLJ 328 : 62 LW 58.
3. *Ramchandra* v. *Kausaly*, AIR 1969 Mys 76.
4. *Bhanwar Lal* v. *Smt. Kamla Devi*, AIR 1983 Raj 229 at p. 237 : 1983 Raj LW 314 : 1983 Raj LR 640 ; (1983) 2 DMC 144.

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ment to obtain the dissolution of a Hindu Marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

SYNOPSIS

1. Savings.
2. Sub-section (1).
3. Sub-section (2).
4. Sub-section (3).
5. Sub-section (4).

1. Savings.—Sections 29 and 30 which deal with savings and repeals must be read together. A saving clause is generally inserted where there is repeal of any statute and re-enactment of the law on the subject and also inserted at times when it is deemed necessary to except something from the operation of the Act which would otherwise have been included. Sometimes savings are inserted to prevent the effect of certain repeals wholly or in part. Savings are also inserted at times *ex majore cantela*.

2. Sub-section (1).—The first saving is that a marriage solemnised between persons belonging to the same *gotra* or *pravara* or belonging to different religions, castes, or sub-divisions of the same caste, which was solemnised before the commencement of this Act, if otherwise valid, should not be considered invalid. The Hindu Marriage Disabilities Removal Act, 1946, Section 3 had laid down already that no text, rule or interpretation of Hindu law or any custom or usage would render a marriage between two Hindus which was otherwise valid to be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara*, or to different sub-divisions of the same caste. But even after this Act, Hindus belonging to different cases could not marry under Hindu Marriages Validity Act, 1949 was passed providing that notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu law or in any custom usage to Hindu marriage which was otherwise valid shall be invalid or deemed ever to have been invalid by reason only of the fact that the parties belonged to different religions, castes or sub-castes. But the above Acts have now have been repealed and Section 29 (1) has reproduced the provisions of those Acts. The provisions of this sub-section are applicable with retrospective effect.[1]

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1. *Kasturi Devi* v. *Chiranji Lal*, AIR 1960 All 446.

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The second saving is of any right recognised by custom,[1] or conferred by any special enactment,[2] which has not been repealed by Section 30 to obtain the dissolution of a marriage, whether it is solemnised before or after the commencement of the Act. It might must be possible in some cases for the parties to have three modes of dissolution of marriage.[3]

3. Sub-section (2).—Saves the right of dissolution of marriage recognised by any custom or conferred by any special enactment as for instance the Travancore Nayar Act which has not been repealed by Section 30 of this Act. This does not mean that a Hindu Marriage Act and that resort should be had only to the provisions of the Nayar Act. The fact that an existing right has been saved in a new enactment does not by itself mean that a right conferred by the new enactment is unavailable to a party entitled to the benefit of the saving.[4] Pendency of petition for dissolution of marriage under Section 5, Nair Act on the date of repeal, right to obtain dissolution under Nair Act continued to be operative.[5] Such a custom not being abrogated it is open to the parties governed by this Act to still adhere to those customary forms of divorce instead of resorting to the Court under the provisions of this enactment.[6] In addition to these customary forms of divorce, there are also certain statutes conferring the right on the spouses to have the marriage dissolved under the provisions of those statutes. Even though these statutes have been repealed by the next section as unnecessary in view of the comprehensiveness of the provisions of this enactment, a proceeding already commenced under such a repealed statute may be continued, conducted and decided under such a statute. If no proceeding under the statute repealed by this Act pending on the date of the Act, a right to divorce given by the repealed statute on the ground of desertion for a particular period cannot be availed of by a petition after its repeal by the present Act. Section 29 (2) excepts customary divorces and divorces available under the statutes not repealed by Section 30.[7] The Travancore Ezhava Act of 1100 is a special enactment coming within the scope of Section 29 (2). The right to obtain dissolution of a petition under Section 15 of the Cochin Nair Act is also saved by Section 29 (2).[8] The provisions as to dissolution of marriage contained in the Madras Aliyasanthana Act are not affected by the Hindu Marriage Act. The said right exists and continues to be available to parties governed by the former Act.[9] Where an order of

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1. *Kamala Nair* v. *Narayana Pillai*, AIR 1958 Bom 12; *Edamma* v. *Hussainappa*, AIR 1965 AP 455.
2. *Sitabai* v. *Ramchandra*, AIR 1958 Bom 116.
3. *Chellappan* v. *Madhavi*, AIR 1961 Ker 311 : ILR (1961) 1 Ker 33.
4. *Chellappan* v. *Madhavi*, AIR 1961 Ker 311.
5. *Gopalkrishnan Nair* v. *Sarasamma*, AIR 1980 Ker 109.
6. *Are Lachiah* v. *Are Rajamallu*, (1963) 1 An WR 295; *Bai Jiratbai* v. *Milkiram*, 1961 (2) Cr LR 469.
7. *Sitabai* v. *Ramchandra*; AIR 1958 Bom 116 (FB) : 59 Bom LR 885; *Vasappan* v. *Saradha*, AIR 1958 Ker 39 (FB); *Balwant Singh* v. *Balwant Kaur*, AIR 1957 Pepsu 1; *Ethirajamma* v. *Venkatachariar*, (1956) 2 MLJ 73 : 69 LW 293.
8. *Leela* v. *Radhakrishnan*, 1977 Ker LT 899.
9. *Prema* v. *Ananda Shetty*, (1973) 1 Mys LJ 7 : AIR 1973 Mys 69.

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dissolution of marriage had not been passed prior to the repeal of the Travancore Nair Act such an order cannot be passed thereafter except in accordance and conformity with the provisions of the Hindu Marriage Act, 1955, be it that the matter is pending in the Court of first instance or the appellate Court or revisional Court.[1]

4. **Sub-section (3).**—The third saving saves all proceedings under the previous law for declaring any marriage as null and void or for annulling or dissolving any marriage or for decree for judicial separation pending at the commencement of this Act, and says that any such proceeding may be continued and determined as if this Act, has not been passed.

5. **Sub-section (4).**—The fourth and the last saving is with respect to marriages between Hindu solemnised under the Special Marriage Act of 1954 and says that those marriages, whether solemnised before or after the commencement of this Act, shall be governed only by that Act.

30. Repeals.—The Hindu Marriage Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriage Validity Act, 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Acts XXII and XXIII of 1946), the Madras Hindu (Bigamy, Prevention and Divorce) Act, 1949, (Madras Act VI of 1949), the Saurashtra Prevention of Bigamous Marriage Act, 1950 (Saurashtra Act V of 1950) and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952) are hereby repealed.

COMMENTS

Bombay case—Domicile—Bombay Prevention of Hindu Bigamous Marriages Act, 1946.[2]

Bombay Prevention of Hindu Bigamous Marriages Act (Bom. XXV of 1946), Sections 4, 5, 8 –Government of India Act, 1935 (25 & 26 Geo, V, Ch. 42), Section 99 ; Seventh Schedule, list III, entries 1, 6—Whether Section 4 (b) of Bombay Act *ultra vires* Bombay Legislature—Accused married in Bombay contracting another marriage outside Bombay—Applicability of Act to such marriage —Domicile—Whether person can be said to be domiciled in province or State in India Permanent residence of person in province or State whether makes him domiciled in province or State.

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1. *Madhavan Nair* v. *Radhamony*, AIR 1979 Ker 152 ; *Krishna Pillai* v. *Subhadra Amma*, AIR 1971 Ker 44 (FB) ; *Madhavi Kutty* v. *Bhasker*, AIR 1976 Ker 71.
2. *Radhabai* v. *State of Bombay*, 57 Bom LR 827 quoted at page 11 above has been overruled by *The State* v. *Narayandas Mangilal Dayame*, 59 Bom LR 901.

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Section 4 (b) of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 is *ultra vires* of the Bombay Legislature.[1]

It is a total misapprehension of the position in law in India to talk of a person being domiciled in a province or in a State. A person can only be domiciled in India as a whole. That is the only country that can be considered in the context of the expression "Domicil", and the only system of law by which a person is governed in India is the system of law which prevails in the whole country and not any system of law which prevails in any province or State. In India there is one citizenship, the citizenship of India; one domicile the domicile in India, and one legal system, the system that prevails in the whole country. The most that one can say about a person in a State is that he is permanently resident in a particular State. But the mere fact that a man's home may be fixed at a particular spot within the country does not make him domiciled in that spot but makes him domiciled in the whole country, and therefore, whether a man permanently resides in Bombay or Madras or Bengal or anywhere does not make him domiciled in Bombay, Madras or Bengal, but makes him domiciled in India. Bombay Madras and Bengal being particular spots in India as a country.

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1. *Radhabai Mohandas* v. *State of Bombay*, (1955) 57 Bom LR 872, overruled; *Macleod* v. *Attorney General for New South Walles*, (1891) AC 455; *Wallace Bros. & Co. Ltd.* v. *Commr. of I. T.*, (1948) 50 Bom LR 482, (P. C.); *Broken Hill South Ltd.* v. *Commissioner of Taxation*, (NSW), (1936-37) 56 CLR 337; *State of Bombay* v. *Chamarbaugwalla*, (1955) 57 Bom LR 288; and *Brook* v. *Brook*, (1861) 9 HLC 193, referred to.

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FORMS OF PETITIONS UNDER THE HINDU MARRIAGE ACT

No. 1—HINDU WIFE'S PETITION FOR DISSOLUTION OF MARRIAGE

IN THE COURT OF THE DISTRICT JUDGE OF KANPUR

Smt. C. daughter of P. N. resident of Mohalla Phul Bagh Kanpur Petitioner.

versus

R. D. s/o B. D. resident of Lal Bagh Lucknow Respondent.

The aforesaid petitioner respectfully submits as follows :

1. That on 4-1-1942 the petitioner was married to R.D. respondent, at Kanpur.

2. That at the time of the marriage, the petitioner and said R. D. were, and still are Hindus.

3. That the parties have two issues of the said marriage viz., K. D. (a son aged 6 years) and P. (a daughter aged 4 years).

4. That the petitioner and respondent last resided together in February 1953 at Lal Bagh in Lucknow.

5. (a) That the respondent is living in adultery with one Smt. R. P.

or

(b) has embraced Christianity (If this be the ground omit in para. 2 "and are still Hindus")

(c) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of this petition

or

(d) has for a period of not less than 3 years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy

or

(e) has, for a period of not less than 3 years immediately preceding the presentation of the petition, been suffering from syphilis in a communicable form, the disease having been contracted from some one other than the petitioner

or

(f) has renounced the world and became a sadhu

or

(g) has not been heard of for over seven years by any one of his relations (In such cases the date of last residing together should be more than seven years remote from the date of petition)

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or

(h) has not resumed cohabitation for a period of over two years after decree No. 713 of 1954 which the petitioner obtained against him for judicial separation

or

(i) has failed to comply for over two years with a decree No. 725 of 1955 for restitution of conjugal rights which the petitioner obtained against him

or

(j) that the respondent has married again after his marriage with the petitioner and that wife is still alive

or

(k) that the respondent has, after his marriage with the petitioner been guilty of rape, sodomy or bestiality.

6. That there is no collusion between the petitioner and the respondent, and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner therefore respectfully prays that the Hon'ble Court may be pleased to dissolve the petitioner's marriage with the respondent.

No. 2— HINDU WIFE'S PETITION FOR NULLITY OF MARRIAGE

Paras. 1 – 4 as in Form No. 1.

5. (a) That the respondent had a wife living at the time of the marriage

or

(b) That the respondent is the brother of the petitioner's deceased husband and as such the parties are within prohibited degrees of relationship

or

(c) That the respondent is the petitioner's mother's brother and as such parties are sapindas of each other

or

(d) That the respondent was impotent at the time of marriage and continues to be so till now

or

(e) That the respondent was an idiot or lunatic at the time of marriage

or

(f) That the petitioner's consent to marriage was obtained by the respondent at a lonely place by putting the petitioner in fear of death. The petitioner secured her release from the respondent's custody only two months ago and has not during the said period of two months lived with him as wife

or

(g) That the petitioner's consent to marriage was obtained by the respondent by falsely representing to her that he was a landed magnate. The petitioner discovered two months ago that the respondent

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owns no property and is a pauper. Since this discovery the petitioner has withdrawn herself from respondent's company and has not lived with him as his wife.

6. (As in Form No. 1).

The petitioner therefore respectfully prays that the Hon'ble Court may be pleased to declare the petitioner's marriage with the respondent as null and void.

No. 3 – HINDU WIFE'S PETITION OF JUDICIAL SEPARATION

Paras 1—4 as in Form No. 1.

5. (a) That the respondent has deserted the petitioner for a continuous period of over two years immediately preceding the presentation of the petition and has neither written to her nor provided her food and raiment.

or

(b) (i) That on 5th of November 1956 the respondent abused the petitioner in a very filthy language at his house in the presence of guests and relations and that on the petitioner's protest the respondent kicked the petitioner and gave her a beating

(ii) That the petitioner is since then living with her brother and has serious apprehension that she will again be beaten, abused and otherwise maltreated if she goes to the respondent's house

or

(c) That the respondent has, for over one year from today been suffering from a virulent type of leprosy

or

(d) respondent has for over three years been suffering from syphilis in a communicable form, the disease having been contracted from some one other than the petitioner

(e) that the respondent has been of unsound mind for over two years

or

(f) The respondent has, after his marriage with the petitioner, had sexual intercourse with Smt. R. P., a servant of the respondent.

Para. 6 as in Form No. 1.

The petitioner therefore respectfully prays that the Hon'ble Court may be pleased to grant judicial separation to your petitioner from the respondent.

No. 4 · HINDU WIFE'S PETITION FOR RESTITUTION OF CONJUGAL RIGHTS

Paras 1—4 as in Form No. 1.

5. That in February 1953 respondent withdrew from cohabitation from the petitioner and has ever since, without any cause, kept away from the petitioner and has not rendered conjugal obligations.

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6. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct. The petitioner respectfully prays that the Hon'ble Court be pleased to order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner and render marital obligations to her.

No. 5—HINDU HUSBAND'S PETITION FOR DISSOLUTION OF MARRIAGE

This petition is to be drafted *mutatis mutandis*, on the lines of Form No. 1, except that clauses (i) and (k) shall not apply.

No. 6—HINDU HUSBAND'S PETITION FOR NULLITY OF MARRIAGE

This petition is to be drafted, *mutatis mutandis*, on the lines of Form No. 2. The following additional ground will, however, be available to the husband.

(b) That the respondent was pregnant at the time of marriage from some person other than the petitioner, and this fact was not known to the petitioner at that time.

(i) That the petitioner has refained from marital intercourse since the discovery of the fact.

No. 7- HINDU HUSBAND'S PETITION FOR JUDICIAL SEPARATION

This petition is to be drafted, *mutatis mutandis*, on the lines of Form No. 3.

No. 8—HINDU HUSBAND'S PETITION FOR RESTITUTION OF CONJUGAL RIGHTS

Paras 1—4 are to be drafted *mutatis mutandis*, on the lines of paras. 1—4 of Form No. 1.

5. That in February 1953 respondent's brother took her away from the petitioner's house by making a representation that the respondent's younger sister was to be married in the following month.

6. That respondent has not returned to the petitioner's house notwithstanding the fact that the petitioner went several times to bring her home.

7. That without any cause the respondent is refusing to perform her marital obligations.

8. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

That the petitioner respectfully prays that the Hon'ble Court may be pleased to order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner's house and render marital obligations to him.

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THE SPECIAL MARRIAGE ACT, 1954

[AS AMENDED UP-TO-DATE]

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The Special Marriage Act, 1954

(No. 43 of 1954)[1]

[*9th October*, 1954]

An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

Be it enacted by Parliament in the Fifth Year of the Republic of India as follows :

CHAPTER I

Preliminary

1. Short title, extent and commencement.—(1) This Act may be called the Special Marriage Act, 1954.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to citizens of India domiciled in the territories to which this Act extends who are [2][in the State of Jammu and Kashmir].

(3) It shall come into force on such date[3] as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) [4][* * * * *]

(b) "degrees of prohibited relationship"—a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedule are within the degrees of prohibited relationship.

Explanation I.— Relationship includes,—

(a) relationship by half or uterine blood as well as by full blood ;

(b) illegitimate blood relationship as well as legitimate ;

(c) relationship by adoption as well as by blood ;

and all terms of relationship in this Act shall be construed accordingly.

---

1. The Act has been extended to Dadra and Nagar Haveli by Reg. 6 of 1963, Section 2 and Schedule I and to Pondicherry by Reg. 7 of 1966, Section 3 and Schedule I.

2. Subs. by Act 33 of 1969, Section 29, for "outside the said territories".

3. 1st January, 1955, vide Notification No. S. R. O. 3606, dated 17th December, 1954, see Gazette of India, Extraordinary, 1954, Part II, Section 3, p. 2463.

4. Clause (a) omitted by Act 33 of 1969, Section 29.

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Explanation II.—"Full blood" and "half blood"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives.

Explanation III.—"Uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands.

Explanation IV.—In Explanations II and III, "ancestor" includes the father and "ancestress" the mother ;

[1][* * * * *]

(d) "district", in relation to a Marriage Officer, means the area for which he is appointed as such under sub-section (1) or sub-section (2) of Section 3 ;

[2][(e) district court" means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the official Gazette as having jurisdiction in respect of the matters dealt with in this Act] ;

(f) "prescribed" means prescribed by rules made under this Act ;

[3][(g) State Government", in relation to a Union Territory, means the administrator thereof.]

3. **Marriage Officers.**—(1) For the purposes of this Act, the State Government may, by notification in the Official Gazette, appoint one or more Marriage Officers for the whole or any part of the State.

[4][(2) For the purposes of this Act, in its application to citizens of India domiciled in the territories to which this Act extends who are in the State of Jammu and Kashmir, the Central Government may, by notification in the Official Gazette, specify such officers of the Central Government as it may think fit to be the Marr iage Officers for the State or any part thereof]

COMMENTS

Marriage.—The marriage solemnized under British Marriage Act between Muslim husband and Hindu wife in 1966 In this context it is pertinent to note that between 1954 to 1969 to Indian citizens domiciled in India could have married under Special Marriage Act even outside India. The marriage is governed by Special Marriage Act, 1954.[5]

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1. Clause (c) omitted by Act 33 of 1969, Section 29.
2. Subs. by Act No. 68 of 1976.
3. Subs. by the Adaptation of Laws (No. 3) Order, 1956, for the original Clause (g).
4. Subs. by Act 33 of 1969, Section 29, for sub-section (2).
5. *Dr. Abdur Rahim Undre* v. *Smt. Padma Abdur Rahim Undre*, AIR 1982 Bom 341.

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CHAPTER II

Solemnization of Special Marriages

4. Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely :

(a) neither party has a spouse living ;

[1][(b) neither party—

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind ; or,

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children ; or

(iii) has been subject to recurrent attacks of insanity or epilepsy ;]

(c) the male has completed the age of twenty-one years and the female the age of eighteen years ;

[2][(d) the parties are not within the degrees of prohibited relationship :

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, nothwithstanding that they are within the degrees of prohibited relationship, and]

[3][(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends.]

[4][*Explanation*.—In this section, "custom", in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family :

Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied—

(i) that such rule has been continuously and uniformly observed for a long time among those members ;

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1. Subs. by Act No. 68 of 1976, Section 21 for clause (b).
2. Subs. by Act 32 of 1963, Section 2, for clause (d).
3. Subs. by Act 33 of 1969, Section 29 for clause (e).
4. Ins. by Act 32 of 1963, Section 2.

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(ii) that such rule is certain and not unreasonable or opposed to public policy ; and

(iii) that such rule, if applicable only to a family, has not been discontinued by the family.]

COMMENTS

Spouse living.—There is nothing in the Act which indicates that any marriage between two Hindus is void, if either of them has a spouse living at the time of marriage. Under Section 4 the said marriage between any two persons may be solemnized under the Act if neither party has a spouse living.[1] Under clause (a) 'spouse' includes a spouse of any valid marriage.[2]

5. Notice of intended marriage.—When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the Second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.

6. Marriage Notice Book and publication.—(1) The Marriage Officer shall keep all notices given under Section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the Marriage of Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2) The Marriage Officer shall cause every such notice to be published by affixing a copy thereof to some conspicuous place in his office.

(3) Where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the Marriage Officer to whom the notice has been given under Section 5, the Marriage Officer shall also cause a copy of such notice to be transmitted to the Marriage Officer of the district within whose limits such party is permanently residing, and that Marriage Officer shall thereupon cause a copy thereof to be affixed to some conspicuous place in his office.

7. Objection to marriage.—(1) Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of Section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in Section 4.

(2) After the expiration of thirty days from the date on which notice of an intended marriage has been published under sub-section (2) of Section 6, the marriage may be solemnized, unless it has been previously objected to under sub-section (1).

(3) The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book, be read over and explained, if necessary, to the person making the objection and shall be signed by him or on his behalf.

1. *Smt. Parameshwari Bai* v. *Muthojirao*, AIR 1981 Kant 40.
2. 75 CWN 303.

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8. Procedure on receipt of objection.—(1) If an objection is made under Section 7 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it; but the Marriage Officer shall not take more than thirty days from the date of the objection for the purpose of inquiring the matter of the objection and arriving at a decision.

(2) If the Marriage Officer upholds the objection and refuses to solemnize the marriage, either party to the intended marriage may, within a period of thirty days from the date of such refusal, prefer an appeal to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer shall act in conformity with the decision of the court.

9. Powers of Marriage Officers in respect of inquiries.—(1) For the purpose of any inquiry under Section 8, the Marriage Officer shall have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely :

(a) summoning and enforcing the attendance of witnesses and examining them on oath ;

(b) discovery and inspection ;

(c) compelling the production of documents ;

(d) reception of evidence of affidavits ; and

(e) issuing commissions for the examination of witnesses ;

and any proceeding before the Marriage Officer shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code (45 of 1860).

Explanation.—For the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the Marriage Officer shall be the local limits of his district.

(2) It appears to the Marriage Officer that the objection made to an intended marriage is not reasonable and has not been made in good faith he may impose on the person objecting costs by way of compensation not exceeding one thousand rupees and award the whole or any part thereof to the parties to the intended marriage, and any order for costs so made may be executed in the same manner as a decree passed by the district court within the local limits of whose jurisdiction the Marriage Officer has his office.

10. Procedure on receipt of objection by Marriage Officer abroad.—Where an objection is made under Section 7 to a Marriage Officer [1][in the State of Jammu and Kashmir in respect of an intended marriage in the State], and the Marriage Officer, after making such inquiry into the matter as he thinks fit, entertains a doubt in respect thereof, he shall not solemnize the marriage but shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer who shall act in conformity with the decision of the Central Government.

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1. Subs. by Act 33 of 1969, Section 29 for certain words.

11. Declaration by parties and witnesses.—(1) Before the marriage is solemnized the parties and three witnesses shall, in the presence of the Marriage Officer sign, a declaration in the form specified in the Third Schedule to this Act, and the declaration shall be countersigned by the Marriage Officer.

12. Place and form of solemnization.—(1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,—"I, (A), take thee (B), to be my lawful wife (or husband)".

13. Certificate of marriage.—(1) When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

COMMENT

Certificate of marriage.—The Certificate of Marriage is a conclusive proof of character and question of notice under the section cannot be raised when once certificate is issued.[1]

14. New notice when marriage not solemnized within three months.—Whenever a marriage is not solemnized within three calendar months from the date on which notice thereof has been given to the Marriage Officer as required by Section 5, or where an appeal has been filed under sub-section (2) of Section 8 within three months from the date of the decision of the district court on such appeal or, where the record of a case has been transmitted to the Central Government under Section 10, within three months from the date of decision of the Central Government, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until a new notice has been given in the manner laid down in this Act.

CHAPTER III

Registration of Marriages Celebrated in other Forms

15. Registration of marriages celebrated in other forms.—Any marriage celebrated, whether before or after the commencement of this Act, other than a

1. *Smt. Purabi Banerjee* v. *Basudeb Mukherjee*, AIR 1969 Cal. 293 : 72 CWN 905.

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marriage solemnized under the Special Marriage Act, 1872 (3 of 1872) or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled, namely :

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since ;

(b) neither party has at the time of registration more than one spouse living ;

(c) neither party is an idiot or a lunatic at the time of registration ;

(d) the parties have completed the age of twenty-one years at the time of registration ;

(e) the parties are not within the degrees of prohibited relationship :

Provided that in the case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two ; and

(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

16. **Procedure for registration.**—Upon receipt of an application signed by both the parties to the marriage for the registration of their marriage under this Chapter, the Marriage Officer shall give public notice thereof in such manner as may be prescribed and after allowing a period of thirty days for objections and after hearing any objection received within that period, shall, if satisfied that all the conditions mentioned in Section 15 are fulfilled, enter a certificate of the marriage in the Marriage Certificate Book in the form specified in the Fifth Schedule, and such certificate shall be signed by the parties to the marriage and by three witnesses.

17. **Appeals from orders under Section 16.**—Any person aggrieved by any order of a Marriage Officer refusing to register a marriage under this Chapter may, within thirty days from the date of the order, appeal against that order to the district court within the local limits of whose jurisdiction the Marriage Officer has his office, and the decision of the district court on such appeal shall be final, and the Marriage Officer to whom the application was made shall act in conformity with such decision.

18. **Effect of registration of marriage under this Chapter.**—Subject to the provisions contained in sub-section (2) of Section 24, where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents :

Provided that nothing contained in this section shall be construed as conferring upon any such children any rights in or to the property of any person other than their parents in any case where, but for the passing of this Act,

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such children would have been incapable of possessing or acquiring any such rights by reason of their not being the legitimate children of their parents.

CHAPTER IV

Consequences of Marriage under this Act

19. Effect of marriage on member of undivided family.—The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religions shall be deemed to effect his severance from such family.

20. Rights and disabilities not affected by Act.—Subject to the provisions of Section 19, any person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (21 of 1850), applies.

21. Succession to property of parties married under Act.—Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have affect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

[1][**21-A. Special provision in certain cases.**—Where a marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jaina religion with a person who professes the Hindu, Buddhist, Sikh or Jaina religion, Section 19 and Section 21 shall not apply and so much of Section 20 as creates a disability shall also not apply].

CHAPTER V

Restitution of Conjugal Rights and Judicial Separation

22. Restitution of conjugal rights.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights, and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[2][*Explanation.*—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society].

COMMENTS

Restitution of conjugal rights.—The relief of maintenance can be granted in the proceeding started for restitution of conjugal rights and filing of separate

1. Ins. by Act No. 68 of 1976.
2. Ibid.

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petition under Section 37 is not necessary.[1] The decree for restitution of conjugal rights must be deemed to be satisfied if the conjugal rights of the aggrieved party have been restored and the particular grievance redressed. The argument that once a decree for restitution of conjugal rights is secured by a husband then even if a wife comes to live with him and does so live for a length of time, every fresh and new desertion by the wife would also be covered by the said decree, and is operative against all future refusal of the wife to live with her husband, future refusal of the wife to live with her husband, even if such refusal be fully justified, is untenable.[2]

23. Judicial separation.—(1) A petition for judicial separation may be presented to the district court either by the husband or the wife—

(a) on any of the grounds specified [3][in sub-section (1) [4][and sub-section (1-A)] of Section 27] on which a petition for divorce might have been presented ; or

(b) on the ground of failure to comply with a decree for restitution of conjugal rights ;

and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

(2) Where the court grants a decree of judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

CHAPTER VI

Nullity of Marriage and Divorce

24. Void marriages.—(1) Any marriage solemnized under this Act shall be null and void [5][and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if—

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of Section 4 has not been fulfilled ; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of Section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of Section 15 :

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1. *Sukhda Sayyad* v. *Masood Sayyad*, 1982 Mah. L. J. 194.
2. *M. P. Shreevastava* v. *Mrs. Veena*, AIR 1966 Punj 506.
3. Subs. by Act 29 of 1970 Section 2 for certain words.
4. Ins. by Act No. 68 of 1976.
5. Subs. by Act No. 68 of 1976.

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Provided that no such declaration shall be made in any case where an appeal has been preferred under Section 17 and the decision of the district court has become final.

25. Voidable marriages.—Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if,—

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage ; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner ; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872).

Provided that, in the case specified in clause (ii), the court shall not grant a decree unless it is satisfied—

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged ;

(b) that proceedings were instituted within a year from the date of the marriage ; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree ;

Provided further that in the case specified in clause (iii), the court shall not grant a decree if,—

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered ; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.

[1][26. Legitimacy of children of void and voidable marriages.—(1) Notwithstanding that a marriage is null and void under Section 24, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 25, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

1. Subs. by Act 68 of 1976.

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(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 25, any rights in or to the property of any person, other than the parents, in any case, where but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents].

27. Divorce.—[1][(1)] Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent—

[2][(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse ; or

(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or]

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (45 of 1860) ; or

[3][* * * *]

(d) has since the solemnization of the marriage treated the petitioner with cruelty ; or

[2][(e) has been incurably or unsound mind, or has been suffering continuous or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.— In this clause,—

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia ;

(b) the expression "psychophatic disorder" means a persistent disorder or disability of mind (whether or not. including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment ; or

(f) has been suffering from venereal disease in a communicable form ; or]

(g) has [3][* * * *] been suffering from leprosy, the disease not having been contracted from the petitioner ; or

(h) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive ; [4][* * *]

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1. Renumbered by Act 29 of 1970, Section 3.
2. Subs. by Act No. 68 of 1976.
3. Omitted by Act No. 63 of 1976.
4. The word "or" omitted by Act 29 of 1970, Section 3.

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[1][*Explanation.*—In this sub-section, the expression "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.]

[2][* * * * *]

[3][* * * *]

[4][(1-A) A wife may also present a petition for divorce to the district court on the ground,—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality ;

(ii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.]

[5][(2) Subject to the provisions of this Act and to the rules made thereunder, either party to a marriage, whether solemnized before or after the commencement of the Special Marriage (Amendment) Act, 1970 (29 of 1970), may present a petition for divorce to the district court on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for the period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties ; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties].

COMMENTS

Divorce.—It cannot be denied that society is generally interested in maintaining the marriage bond and preserving the matrimonial state with a view to protecting societal stability, the family home and the proper growth and happiness of children of the marriage. Legislation for the purpose of dissolving the marriage constitutes a departure from that primary principle and the Legislature is extremely circumspect in setting forth the grounds on which a marriage may be dissolved. The history of all matrimonial legislation will

1. Ins. by Act No. 68 of 1976.
2. Clauses (i) and (j) omitted by Act 29 of 1970, Section 3.
3. Omitted by Act No. 68 of 1976.
4. Ins. by *Ibid.*
5. Ins. by Act 29 of 1970, Section 3.

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show that at the outset conservative attitudes influenced the grounds on which separation or divorce could be granted. Over the decades, a more liberal attitude has been adopted, fostered by a recognition of the need for the individual happiness of the adult parties directly involved. But although the grounds for divorce have been liberalised, they neverthless continue to form an exception to the general principle favouring the continuation of the marital tie. When a legislative provision specifies the grounds on which divorce may be granted they constitute the only condition on which the Court has jurisdiction to grant divorce. If grounds need to be added to those already specifically set forth in the legislation, that is the business of the Legislature and not of the Courts. It is another matter that in construing the language in which the grounds are incorporated the Court should give a liberal construction to it. Indeed, the Courts must give the fullest amplitude of meaning of such a provision. But it must be meaning which the language of the section is capable of holding. It cannot be extended by adding new grounds not enumerated in the section.[1]

[2][27-A. **Alternate relief in divorce proceedings.**—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the ground mentioned in clause (h) of sub-section (1) of Section 27, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation].

COMMENTS

Divorce petition—Maintainability of—The petition for divorce was filed by Indian Citizen under Section 27 read with Section 18 of Foreign Marriage Act. The marriage was not registered under Section 17. Held that petition is maintainable.[3] The conduct of wife amounts to withdrawal from husband's society without any reasonable cause as she has not come to join the husband in spite of several attempts made by him.[4]

Joinder of adulterer as co-respondent—The rule relating to joinder of the adulterer as a co-respondent proceeds on public policy to prevent collusion. Considered in the light of provision of Order 1, Rule 3, C. P. C. the woman with whom the husband was alleged to have committed act of adultery, held was rightly joined in the suit particularly in view of the claim she was not merely a proper party but a necessary party. As such she cannot claim that her name should be struck off under Order 1, Rule 10 (2) of C. P. C.[5]

Adultery—Proof.—A high standard of proof and not a mere balance of probability is required to prove adultery. Mere production of love letters written to wife by a person will not prove adultery, in the absence of proof of the wife's reciprocity.[6]

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1. *Reynold Rajamani and another* v. *Union of India and another*, AIR 1982 SC 1261 at p. 1263.
2. Ins. by Act No. 68 of 1976.
3. *Smt. Joyce Sumathi* v. *Robert Diskson Brodie*, AIR 1982 AP 389.
4. *Dhrubajyoti Chatterjee* v. *Dhia Mukherjee*, AIR 1979 Orissa 93.
5. *Sikha Singh* v. *Dina Chakrabarty*, AIR 1982 Cal. 370 at p. 374.
6. *Jyotish Chandra Guha* v. *Smt. Meera Guha*, AIR 1970 Cal 266 at p. 276.

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28. Divorce by mutual consent.—(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) [1][On the motion of both the parties made not earlier than six months after the date of the presentation of the petitioner referred to in sub-section (1) and not later than eighteen months] after the said date, if the petition is not withdrawn in the meantime, the district court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act, and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

29. Restrictions on petitions for divorce during first three years after marriage.—(1) No petition for divorce shall be presented to the district court [1][unless at the date of the presentation of the petition one year has passed] since the date of entering the certificate of marriage in the Marriage Certificate Book :

Provided that the district court may, upon application being made to it, allow a petition to be presented [1][before one year has passed] on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of respondent, but if it appears to the district court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the district court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the [1][expiry of one year] from the date of the marriage or may dismiss the petition, without prejudice to any petition, which may be brought after the [1][expiration of the said one year] upon the same or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the [1][expiration of one year] from the date of the marriage, the district court shall have regard to the interests of any children of the marriage, and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the [1][said one year].

5. Remarriage of divorced persons.—Where a marriage has been dissolved by a decree of divorce, and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed [2][* * * *], either party to the marriage may marry again.

CHAPTER VII

Jurisdiction and Procedure

31. Court to which petition should be made.—[1][(1) Every petition under Chapter V or Chapter VI shall be presented to the district court within the local limits of whose original civil jurisdiction—

1. Subs. by Act No. 63 of 1976.
2. Omitted by Act No. 68 of 1976.

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(i) the marriage was solemnized ; or

(ii) the respondent, at the time of the presentation of the petition resides ; o

(iii) the parties to the marriage last resided together ; or

(iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years by those who would naturally have heard of him if he were alive].

(2) Without prejudice to any jurisdiction exercisable by the court under sub-section (1), the district court may, by virtue of this sub-section, entertain a petition by a wife domiciled in the territories to which this Act extends for nullity of marriage for divorce if she is resident in the said territories and has been ordinarily resident therein for a period of three years immediately preceding the presentation of the petition and the husband is not resident in the said territories.

32. Contents and verification of petitions.—(1) Every petition under Chapter V or Chapter VI shall state, as distinctly as the nature of the case permits, the facts on which the claim to relief is founded, and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every such petition shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

[1][33. **Proceedings to be in camera and may not be printed or published.**—(1) Every proceeding under this Act shall be conducted in camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees].

34. Duty of court in passing decrees.—(1) In any proceeding under Chapter V or Chapter VI, whether defended or not, if the court is satisfied that,—

(a) any of the grounds for granting relief exists, and

(b) [1][where the petition is founded on the ground specified in clause (a) of sub-section (1) of Section 27, the petitioner has not in any manner been necessary to or connived at or condoned the act of sexual intercourse referred to therein, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty ; and

(c) when divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence ; and

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1. Subs. by Act No. 68 of 1976.

(d) the petition is not presented or prosecuted in collusion with the respondent ; and

(e) there has not been any unnecessary or improper delay in instituting the proceeding ; and

(f) there is no other legal ground why the relief should not be granted ; then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties :

[1][Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (c), clause (e), clause (f) clause (g), and clause (h) of sub-section (1) of Section 27]

[2][(3) For the purpose of aiding the court in bringing about such reconciliation the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceeding have due regard to the report.

(4) In every case where a marriage is dissolved dy a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.

COMMENTS

Delay—Discretion of court.—The legislature was competent to prescribe periods of limitation for causes for which there were no periods of limitation earlier cannot be disputed. Therefore when the Special Marriage Act of 1872 was repealed and the Special Marriage Act of 1954 was enacted, a period of limitation could well have been prescribed within which actions for declaration of nullity of marriage could be brought and none could have questioned it. If instead of prescribing any absolute period of limitation the court is given discretion to consider the question of delay with reference to the facts and circumstances of each case, surely that cannot be a cause for grievance.[3]

[4][35. **Relief for respondent in divorce and other proceedings**.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter claim for any relief under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground].

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1. Ins. by Act No. 68 of 1976.
2. *Ibid.*
3. *Kuppu Damayanthi v. G. Rama Rao*, AIR 1969 Andh Pra 62 at p. 66.
4. Subs. by Act No. 68 of 1976.

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COMMENTS

Adultery.—If the husband alleges adultery by the petitioner he shall have to give the name, address and description of the alleged adulterer. It is however not open to the respondent to seek for such a relief at the hearing of the appeal from a decree for divorce passed on the petition of the wife.[1]

36. Alimony pendente lite.—Where in any proceeding under Chapter V or Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income, it may seem to the court to be reasonable.

37. Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability [2][the conduct of the parties and other circumstances of the case], it may seem to the court to be just.

(2) If the district court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1) it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, [3][it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just].

COMMENTS

Decree for permanent alimony and maintenance—Death of husband—Execution—Maintainability of suit.—Where the husband died on December 18, 1972, leaving behind *inter alia*, an asset of Rs. 2,00,916.00 lying to his credit with his employer. The plaintiff-wife instituted a suit for creation of a charge and also asked for recovery of Rs. 8,750/- claimed to be due as outstanding maintenance until the date of the suit and for an injunction against withdrawal of the money lying with the Indian Airlines (employer) until adequate arrangement was made for payment of alimony to her. The claim was contested by the ex-employer (defendant 1) and two ladies impleaded as defendants 2 and 3 on the disclosure by the defendant 1 that they were the wives of the deceased-husband. Resistance was mainly on two grounds: (1) that the order for payment of alimony lapsed with the death of the husband; and (2) that a separate suit for this claim was not maintainable in view of Section 47 of the Code of Civil Procedure.

Held that, the suit could as a measure of *ex debito justitiae* be treated as an execution petition. There was good authority for converting an execution application into a suit and there could be no valid objection to the counter-

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1. *Jyotish Chandra Guha* v. *Smt. Meera Guha*, AIR 1970 Cal. 266.
2. Subs. by Act No. 68 of 1976.
3. *Ibid.*

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process of converting a suit into an execution proceeding, particularly when an ill-advised widow would on account of some procedural error be likely to be deprived of the fruits of an order of maintenance.[1]

Interpretation of the section—Decree for alimony—Death of husband—If decree not extinguished and assets left by him are liable for the satisfaction of the decree for maintenance.—The language of Section 37 does not warrant the conclusion that there is extinguishment of the decree for alimony upon the death of the judgment debtor husband.

There is no rationality in the contention that a decree for maintenance or alimony gets extinguished with the death of the husband when any other decree even though not charged on the husband's property would not get so extinguished. A decree against the husband is executable against the estate of the husband in the hands of the heirs and there is no personal liability In law a maintenance decree would not make any difference. The decree indicates that maintenance was payable during the lifetime of the widow. To make such a decree contingent upon the life of the husband is contrary to the terms and the spirit of the decree and the appellant has taken a stand that though the widow is alive, the decree obtained by her would become ineffective with the passing away of the husband.

There is no ambiguity in Section 37 for the interpretation of which it is necessary to go beyond the provision itself. It is one of the settled principles of the interpretation that the Court should lean in favour of sustaining a decree and should not permit the benefits under a decree to be lost unless there be any special reason for it. In incorporating a provision like Section 37 in the Act, Parliament intended to protect the wife at the time of divorce by providing for payment of maintenance. If the husband has left behind an estate at the time of his death there can be no justification for the view that the decree is wiped out and the heirs would succeed to the property without the liability of satisfying the decree.

Therefore, the decree in the instant case was not extinguished with the death of husband and the assets left behind by him are liable to be proceeded against in the hands of his legal heirs for satisfaction of the decree for maintenance.[2]

38. Custody of children.—In any proceeding under Chapter V or Chapter VI the district Court may, from time to time, pass such interim orders and make such provisions in the decree as it may seem to it to be just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make, revoke, suspend or vary, from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending.

COMMENTS

Custody, maintenance and education.—The court can make order for custody, maintenance and education of minor at the passing of the decree.[3]

1. *Smt. Nandarani Mazumdar* v. *Indian Airlines and others*, AIR 1983 SC 1201 at pp. 1201 and 1202.
2. *Mrs. Aruna Basu Mullick* v. *Mrs. Dorathea Mitra*, AIR 1983 SC 916 at pp. 917, 918 and 919.
3. *Dhrubajyoti Chatterjee* v. *Dhia Mukherjee*, AIR 1979 Orissa 93.

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[1][39. Appeals from decrees and orders.—(1) All decrees made by the court in any proceeding under Chapter V or Chapter VI shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under Section 37 or Section 38 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeal ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.]

COMMENTS

Decree for divorce—Period spent in obtaining certified copy of the decree —Exclusion of time.—Where the Additional District Judge granted the decree of divorce on 24-3-1981. The wife made an application for a certified copy of the judgment on the very next day, that is, 25-3-1981. The certified copy was ready on 14-4-1981. The wife took the certified copy of the judgment. On 23-4-1981 she made an application for the certified copy of the decree. The certified copy of the decree was ready on 16-5-1981. On 21-5-1981 the wife filed the appeal in the High Court.

Admittedly, if the period spent in obtaining the certified copy of the decree from 23-4-1981 to 16-5-1981 is excluded the appeal is within time. The only question is whether this period which the wife spent in obtaining the certified copy of the decree after having obtained the copy of the judgment, can be excluded. Held that she was entitled to exclude this time which she spent in obtaining the certified copy of the decree from 23-4-1981 to 16-5-1981.[2]

[3][39-A. Enforcement of decrees and orders.—All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced.]

CMMOENT

Scope.—An order under Section 36 is appealable under Section 39.[4]

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1. Subs. by Act No. 68 of 1976.
2. *Jyoti Malhotra* v. *Kewal Kishore Malhotra*, AIR 1983 Delhi 148 at p. 149 : 1982 Marriage LJ 378 : 1982 Rajdhani LR 278 : (1982) 1 DMC 201 : 1982 DRJ 201 : (1982) 84 Pun LR (D) 94 : ILR (1982) 1 Delhi 390.
3. Ins. by Act No. 68 of 1976.
4. *Maharaj Singh* v. *Smt. Uma Singh*, AIR 1969 All. 603 at p. 604.

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40. Application of Act 5 of 1908.—Subject to the other provisions contained in the Act, and to such rules as the High Court may make in this behalf, all proceedings under this Act, shall be regulated, as far as may be by the Code of Civil Procedure, 1908 (5 of 1908).

[1][**40-A. Power to transfer petitions in certain cases.**—(1) Where—

(a) a petition under this Act has been presented to the district court having jurisdiction by a party to the marriage praying for a decree for judicial separation under Section 23 or for a decree of divorce under Section 27, and

(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for decree for judicial separation under Section 23, or for decree of divorce under Section 27 on any ground whether in the same district court or in a different district court, in the same State or in a different State,

the petition shall be dealt with as specified in sub-section (2).

(2) in a case where sub-section (1) applies,—

(a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

40-B. Special provision relating to trial and disposal of petitions under the Act.—(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the court finds the adjournment of the trial beyond the following dy to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

40-C. Documentary evidence.—Notwithstanding anything contained in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.]

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1. Ins. by Act No. 68 of 1976.

COMMENTS

Applicability.—Section attracts provisions of Order 19, C. P. C. Affidavit evidence was permissible.[1]

41. Power of High Court to make rules regulating procedure.—(1) The High Court shall, by notification in the Official Gazette, make such rules consistent with the provisions contained in this Act and the Code of Civil Procedure, 1908 (5 of 1908), as it may consider expedient for the purpose of carrying into effect the provisions of Chapters V, VI and VII.

(2) In particular, and without prejudice to the generality of the foregoing provisions, such rules shall provide,—

(a) the impleading by the petitioner of the adulterer as a co-respondent on a petition for divorce on the ground of adultery, and the circumstances in which the petitioner may be excused from doing so ;

(b) the awarding of damages against any such co-respondent ;

(c) the intervention in any proceeding under Chapter V or Chapter VI by any person not already a party thereto ;

(d) the form and contents of petitions for nullity of marriage or for divorce and the payment of costs incurred by parties to such petitions ; and

(e) any other matter for which no provision or no sufficient provision is made in this Act and for which provision is made in the Indian Divorce Act, 1869 (4 of 1869).

CHAPTER VIII

Miscellaneous

42. Saving.—Nothing contained in this Act shall affect the validity of any marriage not solemnized under its provisions ; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage.

43. Penalty on married person marrying again under this Act.—Save as otherwise provided in Chapter III, every person who, being at the time married, procures, as marriage of himself or herself to be solemnized under this Act shall be deemed to have committed an offence under Section 494 or Section 495 of the Indian Penal Code, 1860 (45 of 1860), as the case may be, and the marriage so solemnized shall be void.

44. Punishment of bigamy.—Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in Section 494 and Section 495 of the Indian Penal Code, 1860 (45 of 1860), for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

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1. *Annalie Prashad* v. *Romesh Prasad*, AIR 1968 Cal. 48 at p. 48.

45. Penalty for signing false declaration or certificate.—Every person making, signing or attesting any declaration or certificate required by or under this Act containing a statement which is false and which he either knows or believes to be false or does not believe to be true shall be guilty of the offence described in Section 199 of the Indian Penal Code, 1860 (45 of 1860).

46. Penalty for wrongful action of Marriage Officer.—Any Marriage Officer who knowingly and wilfully solemnized a marriage under this Act,—

(1) without publishing a notice regarding such marriage as required by Section 5, or

(2) within thirty days of the publication of the notice of such marriage, or

(3) in contravention of any other provision contained in this Act,

shall be punishable with simple imprisonment for a term which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

47. Marriage Certificate Book to be open to inspection.—(1) The Marriage Certificate Book kept under this Act shall at all reasonable times be open for inspection and shall be admissible as evidence of the statements therein contained.

(2) Certified extracts from the Marriage Certificate Book shall, on application, be given by the Marriage Officer to the applicant on payment by him of the prescribed fee.

48. Transmission of copies of entries in marriage records.—Every Marriage Officer in a State shall send to Registrar-General of Births, Deaths and Marriages of that State at such intervals and in such form as may be prescribed a true copy of all entries made by him in the Marriage Certificate Book since the last of such intervals, and, in the case of Marriage Officers outside the territories to which this Act extends, the true copy shall be sent to such authority as the Central Government may specify in this behalf.

49. Correction of errors.—(1) Any Marriage Officer who discovers any error in the form of substance of any entry in the Marriage Certificate Book may, within one month next after the discovery of such error, in the presence of the persons married or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin without any alteration of original entry and shall sign the marginal entry and add thereto the date of such correction and the Marriage Officer shall make the like marginal entry in the certificate thereof.

(2) Every correction made under this section shall be attested by the witnesses in whose presence it was made.

(3) Where a copy of any entry has already been sent under Section 48 to the Registrar-General or other authority the Marriage Officer shall make and send in like manner a separate certificate of original erroneous entry and of marginal corrections therein made.

50. Power to make rules.—(1) The Central Government, in the case of [1][* * *] officers of the Central Government, and the State Government, in all other cases, may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

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1. The words "diplomatic and consular officers and other" omitted by Act 33 of 1969, Section 29.

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(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :

(a) the duties and powers of Marriage Officers and the areas in which they may exercise jurisdiction ;

(b) the manner in which a Marriage Officer may hold inquiries under this Act and the procedure therefor ;

(c) the form and manner in which any books required by or under this Act shall be maintained ;

(d) the fees that may be levied for the performance of any duty imposed upon a Marriage Officer under this Act ;

(e) the manner in which public notice shall be given under Section 16 ;

(f) the form in which, and the intervals within which, copies of entries in the Marriage Certificate Book shall be sent in pursuance of Section 48 ;

(g) any other matter which may be or requires to be prescribed.

51. Repeals and Savings.—(1) The Special Marriage Act, 1872 (3 of 1872), and any law corresponding to the Special Marriage Act, 1872 (3 of 1872), in force in any Part B State immediately before the commencement of this Act are hereby repealed.

(2) Notwithstanding such repeal,—

(a) all marriages duly solemnized under the Special Marriage Act, 1872 (3 of 1872), or any such corresponding law shall be deemed to have been solemnized under this Act ;

(b) all suits and proceedings in causes and matters matrinonial which, when this Act comes into operation, are pending in any court shall be dealt with and decided by such court, so far as may be, as if they had been originally instituted therein under this Act.

(3) The provisions of sub-section (2) shall be without prejudice to the provisions contained in Section 6 of the General Clauses Act, 1897 (10 of 1897), which shall also apply to the repeal of the corresponding law as if such corresponding law had been an enactment.

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THE FIRST SCHEDULE

[*See* Section 2 (b) "Degrees of prohibited relationship"]

Part I

1. Mother.
2. Father's widow (step-mother).
3. Mother's mother.
4. Mother's father's widow (step grand mother).
5. Mother's mother's mother.
6. Mother's mother's father's widow (step great grand-mother).
7. Mother's father's mother.
8. Mother's father's father's widow (step great grand-mother).
9. Father's mother.
10. Father's father's widow (step grand-mother).
11. Father's mother's mother.
12. Father's mother's father's widow (step great grand-mother).
13. Father's father's mother.
14. Father's father's father's widow (step great grand-mother).
15. Daughter.
16. Son's widow.
17. Daughter's daughter.
18. Daughter's son's widow.
19. Son's daughter.
20. Son's son's widow.
21. Daughter's daughter's daughter.
22. Daughter's daughter's son's widow.
23. Daughter's son's daughter.
24. Daughter's son's son's widow.
25. Son's daughter's daughter.
26. Son's daughter's son's widow.
27. Son's son's daughter.
28. Son's son's son's widow.
29. Sister.
30. Sister's daughter.
31. Brother's daughter.
32. Mother's sister.
33. Father's sister.
34. Father's brother's daughter.
35. Father's sister's daughter.
36. Mother's sister's daughter.
37. Mother's brother's daughter.

Explanation.—For the purposes of this Part, the expression "widow" includes a divorced wife.

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Part II

1. Father.
2. Mother's husband (step-father).
3. Father's father.
4. Father's mother's husband (step grand-father).
5. Father's father's father.
6. Father's father's mother's husdand (step great grand-father).
7. Father's mother's father.
8. Father's mother's mother's husband (step great grand-father).
9. Mother's father.
10. Mother's mother's husband (step grand-father).
11. Mother's father's father.
12. Mother's father's mother's husband (step great grand-father).
13. Mother's mother's father.
14. Mother's mother's mother's husband (step great grand-father).
15. Son.
16. Daughter's husband.
17. Son's son.
18. Son's daughter's husband.
19. Daughter's son.
20. Daughter's daughter's husband.
21. Son's son's son.
22. Son's son's daughter's husband.
23. Son's daughter's son.
24. Son's daughter's daughter's husband.
25. Daughter's son's son.
26. Daughter's son's daughter's husband.
27. Daughter's daughter's son.
28. Daughter's daughter's daughter's husband.
29. Brother.
30. Brother's son.
31. Sister's son.
32. Mother's brother.
33. Father's brother.
34. Father's brother's son.
35. Father's sister's son.
36. Mother's sister's son.
37. Mother's brother's son.

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Explanation.—For the purposes of this Part, the expression "husband" includes a divorced husband.

THE SECOND SCHEDULE

(*See* Section 5)

Notice of Intended Marriage

To

Marriage Officer for the..... .....District.

We hereby give you notice that a marriage under the Special Marriage Act, 1954, is intended to be solemnized between us within three calendar months from the date hereof.

Name	Condition	Occupation	Age	Dwelling place	Permanent dwelling place if present dwelling place not permanent	Length of residence
A. B.	Unmarried / Widower / Divorcee					
C. D.	Unmarried / Widow / Divorcee					

Witness our hands this.....day of.....19

(Sd.) A. B.

(Sd.) C. D.

THE THIRD SCHEDULE

(*See* Section 11)

Declaration to be made by the Bridegroom

I, A. B., hereby declare as follows :—

1. I am at the present time unmarried (or a widower or a divorcee, as the case may be).
2. I have completed.....years of age.
3. I am not related to C. D. (the bride) within the degrees of prohibited relationship.
4. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false or do not believe it to be true, I am liable to imprisonment and also to fine.

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(Sd.) A. B. (the Bridegroom).

Declaration to be made by the Bride

I, C. D., hereby declare as follows :

1. I am at the present time unmarried (or a widow or a divorcee, as the case may be).
2. I have completed.....years of age.
3. I am not related to A. B. the (bridgroom) within the degrees of prohibited relationship.
4. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false or do not believe it to be true, I am liable to imprisonment and also to fine.

(Sd.) C. D. (the Bride).

Signed in our presence by the above-named A. B. and C. D. So far as we are aware there is no lawful impediment to the marriage.

(Sd.) G. H.
(Sd.) I. J. } Three witnesses.
(Sd.) K. L.

Countersigned E. F.,
Marriage Officer

Dated the.....day of.....19

THE FOURTH SCHEDULE

(*See* Section 13)

Certificate of Marriage

I, E. F., hereby certify that on the.....day of.....19..... A. B. and C. D.* appeared before me and that each of them, in my presence and in the presence of three witnesses who have signed hereunder, made the declarations required by Section 11 and that a marriage under this Act was solemnized between them in my presence.

(Sd.) E. F.
Marriage Officer for
(Sd.) A. B. Bridegroom
(Sd.) C. D. Bride.

(Sd.) G. H.
(Sd.) I. J. } Three witnesses
(Sd.) K. L.

Dated the.....day of.....19

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*Herein give particulars of the parties.

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THE FIFTH SCHEDULE

(*See* Section 16)

Certificate of Marriage Celebrated in other Forms

I, E. F., hereby certify that A. B. and C. D.* appeared before me this.....day of .....19..... and that each of them, in my presence and in the presence of three witnesses who have signed hereunder have declared that a ceremony of marriage has been performed between them and that they have been living together as husband and wife since the time of their marriage, and that in accordance with their desire to have their marriage registered under this Act, the said marriage has, this.....day of.....19..... been registered under this Act, having effect as from.....

(Sd.) E. F.,

Marriage Officer for

(Sd.) A. B.,

Husband.

(Sd.) C. D.,

Wife.

(Sd.) G. H.
(Sd.) I. J.
(Sd.) K. L. } Three witnesses.

Dated the.....day of.....19

*Herein give particulars of the parties.

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APPENDIX—I

RULES OF HIGH COURT

1. ALLAHABAD HIGH COURT

THE HINDU MARRIAGE AND DIVORCE RULES, 1956

No. 250/VHC-22, dated 18th September, 1956.—In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act XXV of 1955), the High Court of Judicature at Allahabad is pleased to make the following rules :

1. **Short title and commencement.**—These rules may be called the Hindu Marriage and Divorce Rules, 1956. They shall come into force with effect from the date of their publication in the Uttar Pradesh Gazette.

2. **Definitions.**—(i) "Act" means the Hindu Marriage Act, 1955 (Act XXV of 1955).

(ii) 'Code' means the Code of Civil Procedure, 1908.

(iii) 'Court' means the Court mentioned in Section 3 (b) of the Act.

3. **Petition.**—(a) Every petition under the Act shall be accompanied by a certified extract from the Hindu Marriage Register maintained under Section 8 of the Act, where the marriage has been registered under this Act.

(b) Every petition for divorce on any of the grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

4. **Forms of petitions.**—The petition made under the Act and the answers filed thereto shall, so far as may be, with necessary modifications and adaptations, be the same as those prescribed in the Schedule to the Indian Divorce Act, 1869 (Act IV of 1869).

5. **Contents of petitions.**—In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status, and domicile of the wife and husband before and after the marriage ;

(c) the principal permanent address where the parties cohabited and the address where they last resided together ;

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(d) whether there is living any issue of the marriage and if so, the names, dates of birth and ages of such issues ;

(e) in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons, the name, occupation and place of residence of such person or persons so far as they can be ascertained ;

(f) in every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation on the ground that her husband has committed adultery with any woman or women, the name, occupation and place of residence of such woman or women so far as they can be ascertained ;

(g) whether there have been in any Court in India, and if so, what previous proceeding with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

(h) the matrimonial offence or offences charged set out in separate paragraphs with the time and place of its or their alleged commission ;

(i) property mentioned in Section 27 of the Act, if any ;

(j) the relief or reliefs prayed for.

6. **Necessary parties.**—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make the alleged adulterer or adulteress a co-respondent to the petition unless he or she is excused by the Court from doing so on any of the following grounds :

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery ;

(ii) that such person is dead ;

(iii) that the respondent if a woman is leading the life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ; or

(iv) any other reason that the Court considers sufficient.

(b) In every petition under Section 13 (1) and (2) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Section 11 of the Act on the ground that the condition in Section 5 (1) is contravened the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

(d) If a petitioner does not make the alleged adulterer or adulteress a co-respondent he shall at the time of presenting the petition file a separate application supported by an affidavit giving the reasons.

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7. **Verification of petition.**— Statements contained in every petition shall be verified by the petitioner or some other competent person in the manner required by the Code for verification of plaints.

8. **Application for leave under Section 14 of the Act.**—(1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition of divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing proper court-fee. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such application may ; unless the Court otherwise directs, be given by affidavit.

(4) When the Court grants leave the petition shall be deemed to have been duly filed on the date of the said order. The petitioner shall within a week of order or within such further time as is allowed by the Court, file sufficient number of copies of application for leave, the affidavit in support thereof, the order of the Court thereon and the petition of divorce for service upon the respondent in the petition.

9. **Service of order granting leave and procedure after service.**—(1) When the Court grants leave under the preceding rule a copy of the application for leave, the affidavit in support thereof and the order granting leave along with the notice of the petition of divorce shall be served on the party to be affected thereby personally :

Provided the Court may for a sufficient reason direct substituted service.

(2) (a) If the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The court may, if it deems fit, decide as a preliminary issue, the question as to the propriety of the leave granted to the petitioner and may for that purpose summon and examine witnesses.

10. **Notices.**—The Court shall issue notice accompanied by a copy of the petition to the respondent and co-respondent, if any. The notice shall require, unless the Court otherwise directs, the respondent, or co-respondent to file his or her statement in Court, within one month of the service of the notice and to serve a copy thereof upon each of the other parties to the petition within the aforesaid period.

11. **Service of petition.**—Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of Code of Civil Procedure ;

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Provided that the Court may dispense with such service altogether in case it seems necessary or expedient to do so.

12. Written statement or answers to petitions by respondents.—The respondent may and, if so required by the Court shall present a written statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to such written statements. If in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion the written statements shall state the particulars of such adultery, cruelty or desertion.

13. Intervener's petitions.—Unless the Court for good cause shown otherwise directs, where the written statement of the respondent alleges adultery by the petitioner with a named man or woman a certified copy of such statement or such material portion thereof containing such allegations shall be served on such man or woman accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the case.

Costs regarding intervention—

(1) Whenever the Court finds that an intervener had no sufficient grounds to intervene, it may order the intervener to pay the whole or any part of the costs occasioned by the petition to intervene.

(2) When the Court finds that the charge or allegation of adultry against the intervener made in the petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation to pay to the intervener the whole or any part of the cost of intervention.

14. Answer.—A person to whom leave to intervene has been granted, may file in the Court an answer to a written statement containing the charge or allegations against the intervener.

15. Mode of taking evidence.—The witnesses in all proceedings before the Court, where their attendance can he had, shall, be examined orally and any party may offer himself as a witness and shall be examined and may be cross-examined like any other witnesses :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined, by or on behalf of the opposite party, orally and after such cross-examination may be re-examinen, by or on behalf of the party by whom such affidavit was filed.

16. Costs. Whenever in any petition any alleged adulterer or adulteress has been made a co-respondent and the adultery has been established the court may order the co-respondent to pay the whole or any part of the costs of such proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute;

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(ii) if the co-respondent had not, at the time of adultery reason to believe the respondent to be a married person.

17. Application for alimony and maintenance.—(a) Every application for any of the reliefs mentioned in Sections 24, 25 (1) and 26 of the Act, shall be supported by an affidavit stating the average monthly incomes of the petitioner and the respondent, the source of the incomes, particulars of other movable and immovable property owned by them and the names and ages of the persons dependent on the petitioner and the respondent.

(b) Every application for either of the reliefs mentioned in sub-sections (2) and (3) of Section 25 of the Act shall be accompanied by a certified copy of the order passed under sub-section (1) and supported by an affidavit. It may be disposed of by the Court in its direction on affidavits "after giving an opportunity to the party affected to be heard."

18. Taxation of costs.—Unless otherwise directed by the Court the costs in petition under the Act shall be taxed as if the proceedings were a suit.

19. Order as to costs.—The award of costs shall be within the discretion of the Court.

20. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce of nullity of marriage or dissolution of marriage to the Registrar of Marriages in charge of the Hindu Marriage Act Register, if any.

———

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2. ANDHRA PRADESH HIGH COURT

HINDU MARRIAGE RULES

Rules to regulate proceedings under the Hindu Marriage Act, 1955.

(Central Act 25 of 1955)

Rec. No. 422/54 BI.—In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Central Act 25 of 1955), the High Court hereby makes the following rules to regulate proceedings under the said Act,—

1. **Defintions.**—(i) 'Act' means the Hindu Marriage Act, 1955 (Act 25 of 1955).

(ii) 'Court' means the court mentioned in Section 3 (b) of the Act.

2. **Form of proceedings.**—The following proceedings under the Act shall be initiated by original petitions—

(i) under Section 9 for restitution of conjugal rights ;

(ii) under sub-section (1) of Section 10 for judicial separation ;

(iii) under sub-section (2) of Section 10 for rescinding a decree for judicial separation ;

(iv) under Section 11 for declaring a marriage null and void ;

(v) under Section 12 for annulment of a marriage by a decree of nullity ;

(vi) under Section 13 for divorce ;

(vii) under Section 26 to make orders and provision with respect to the costody, maintenance and education of children.

3. Every other proceeding subsequent to the petition shall be by an interlocutory application.

4. Every petition, application, affidavit, decree or order under the Act shall be headed by a cause title in Form No. 1 and shall set forth the provision of the Act under which it is made.

5. **Petition.**—(a) Every petition under the Act shall be accompanied by a certified copy of the entry relating to the marriage in question in the Hindu Marriage Register maintained under Section 8 of the Act, where such marriage has been registered under the Act.

(b) Every petition for divorce on any of the grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights, as the case may be.

6. **Contents of petition.**—(1) Every petition shall state—

(a) the place and the date of the marriage ;

(b) the names of the parties and their occupation ;

(c) the place and address where the parties reside or last resided together within the jurisdiction of the Court ;

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(d) the names of the children, if any, of the marriage together with their dates of birth or age ;

(e) if prior to the date of the petition there has been any proceeding under the Act between the parties to the petition the full particular thereof ;

(f) if the petition is for restitution of conjugal rights, the date on or from which and the circumstances under which the respondent withdrew from the society of the petitioner ;

(g) if the petition is for judicial separation, the matrimonial offence alleged or other grounds upon which the relief is sought, together with full particulars thereof so far as such particulars are known to the petitioner, e. g. :

(i) in the case of alleged desertion, the date and the circumstances under which it began ;

(ii) in the case of cruelty or sexual intercourse with any person other than his or her spouse, the specific act of cruelty or sexual intercourse and the occasion when and the places where such acts were committed together with the name and address of the person or persons with whom the respondent had sexual intercourse ;

(iii) in the case of virulent form when such ailment began to manifest itself, the nature and the period of the curative steps taken together with the name and address of the person who treated for such ailment and in the case of veneeral disease that it was not contracted from the petitioner ;

(iv) in the case of unsoundness of mind, the time when such unsoundness began to mainfest itself, the nature and period of any curative steps taken together with the name and address of the person who treated for such unsoundness of mind ;

(h) if the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are known to the petitioner, e. g. :

(i) in the case of adultery, the specific acts of adultery and the occasion when and place where such acts were committed together with the name and address of the person with whom such adultery was committed ;

(ii) in the case of incurable unsoundness of mind the time when such unsoundness began to manifest itself the nature and period of any curative step taken together with name and address of the person who treated for such unsoundness of mind ;

(iii) in the case of virulent and incurable form of leprosy or venereal disease in a communicable form, when such ailment began to manifest itself, the nature and the period of curative steps taken together with the name and address of the person who treated for such ailment ;

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(iv) in the case or presumption of death, the last place where the parties lived together date when and the place where the respondent was last seen or heard of as alive and the steps, if any, taken to ascertain his or her whereabouts ;

(i) if the petition is for a decree of nullity of marriage on the ground specified in clause (c) or clause (d) of sub-section (1) of Section 12 of the Act, the time when the facts relied on were discovered, and whether or not marital intercourse with the consent of the petitioner took place after the discovery of the said facts.

(2) The petition shall set out at the end, the relief or reliefs sought including any claim for—

(i) custody, care and maintenance of children ;

(ii) permanent alimony and maintenance ;

(iii) costs.

Where a claim is made under clause above, the petition shall specify the annual or capital value of the respondent's property the amount of his or her annual earnings and other particulars relating to his or her financial resources and the particulars relating to the petitioner's income and other property.

7. **Contents of written statement.**— Every written statement in answer to a petition for restitution of conjugal rights shall set out the particulars as far as may be set out in clauses (g), (h) and (i) of sub-rule (1) of Rule 6.

8. **Co-respondent.**— (1) Where a husband's petition alleges adultery on the part of respondent, the alleged adulterer shall, if he is living, be made a co-respondent in the petition ;

Provided, however, that in case the adulterer's name, identity or whereabouts are unknown to the petitioner in spite of reasonable enquiries made and the Court is satisfied that it is just and expedient so to do, it shall, on the application of the petitioner, dispense with the naming of the co-respondent.

(2) In every petition under Section 13 (2) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(3) In every petition under Section 11 of the Act, on the ground, that the condition in Section 5 (i) contravened, the petitioner shall make the spouse alleged to be living at the time of marriage, a co-respondent.

9. **Damages and costs against co-respondent.**— (1) Where damages are claimed, the court shall assess the damages and direct in what manner the damages, if any awarded shall be paid or applied.

(2) The court may also direct the whole or any part of the costs of the petition shall be paid by the co-respondent :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(a) if the respondent was, at the time of adultery, living apart from her husband and leading the life of a prostitute ;

(b) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

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(3) The court may assess damages and make an order for payment thereof or of costs notwithstanding that the respondent or co-respondent or both of them have remained *ex parte*.

10. **Application for maintenance pendente lite and for permanent alimony and maintenance.** - (a) Every application for maintenance *pendente lite*, permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children, shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other movable and immovable property owned by them, the number of dependents on the petitioner and the respondent, and names and ages of such dependents.

(b) Such application shall be supported by an affidavit of the applicant.

11. **Application for leave under Section 14 of the Act.**—(1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall obtain leave of the court under Section 14 of the Act on *ex parte* application made to the court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the prescribed court-fee and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent on the basis of which leave is sought.

(3) The evidence in such an application may, unless the court otherwise directs be given by affidavit.

(4) When the court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week of the date of the said order shall file sufficient number of copies of application for leave and order of the court thereon and of the petition for divorce for service upon the respondent in petition.

12. **Service of copy of application for and order granting leave on the respondents and procedure after service.**—(1) When the court grants leave under the preceding rule, a copy of the application for leave and order granting leave shall be served on each of the respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground, that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth his or her written statement, the grounds with particulars on which the grant of leave is sought to be contested.

(b) The court may, if it so deems fit, frame, try and decide the issue as to the propriety of the leave granted as a preliminary issue.

(c) The court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

13. When a petition is admitted, the Chief Ministerial Officer of the court shall assign a distinctive number to the petition and all subsequent proceedings on the petition shall bear that number.

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14. Along with the petition the petitioner shall furnish a copy thereof for service on the respondent and if a co-respondent has been impleaded, an additional copy for service on him, together with the fee prescribed under the Andhra Court Fees Suits Valuation Act, 1956, for service of notices.

15. (1) Notice of the petition shall be in Form No. II for settlement of issues and shall require the respondent and the co-respondent, if one is named in the petition to enter appearance in person or by pleader and file a written statement not less than seven days before the day fixed in the notice.

(2) The notice together with copy of the petition shall be served on the respondent and the co-respondent, if named, in the manner prescribed for service of summonses in suits not less then 21 days before the day appointed therein.

16. **Transmission of certified copy of the decree.**— The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Registrar of Marriage in charge of the Hindu Marriage Register, if any.

17. (1) Appeals to the High Court from the decree and orders of the District Court shall be posted before a Bench of two Judges.

(2) Such appeals shall be governed by the Rules of the High Court, Appellate side, as far as they may be applicable.

(3) In every such appeal notice shall be issued to the co-respondent, if any.

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3. BOMBAY HIGH COURT

THE HINDU MARRIAGE AND DIVORCE RULES, 1955[1]

1. **Short title and commencement.**—(i) These rules may be called the Hindu Marriage and Divorce Rules, 1956.

(ii) These Rules shall come into force on 1st December, 1955.

2. **Definitions.**—(i) "Act" means the Hindu Marriage Act, 1955 (Act XXV of 1955).

(ii) 'Code' means the Code of Civil Procedure, 1908.

(iii) 'Court' means the Court mentioned in Section 3 (b) of the Act.

3. **Petition.**—(a) Every petition under the Act shall be accompanied by certified extracts from the Hindu Marriage Register maintained under Section 8 of the Act or from the Register maintained under the Bomaby Registration and Marriage Act (Bombay Act V of 1954) where the marriage has been registered under the Bombay Act or this Act.

(b) Every petition for divorce on any of the grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

4. **Contents of petitions.**—(i) In addition to the particulars required to be given under Order VII, Rule 1 of the Civil Procedure Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status and domicile of the wife and husband, before and after the marriage ;

(c) the principal permanent address where the parties cohabited including the address where they last resided together ;

(d) whether there is living any issue of the marriage and, if so, the names and dates of birth or ages of such issues :

(i) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons, the petitioner shall state the names, occupation and place of such person or persons so far as they can be ascertained ;

(ii) In every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation on the ground that her husband has committed adultery with any woman, or women, the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained ;

(e) whether there have been in any Court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

1. High Court Notification No. P. 0102/55, dated 12th November, 1955.

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(f) the statement that there is no collusion between the petitioner and the other party to the marriage ;

(g) the matrimonial offence or offences charged set out in separate paragraphs with the time and place of its or their alleged commission ;

(h) property mentioned in Section 27 of the Act, if any ;

(i) the relief or reliefs prayed for.

5. **Necessary parties.**—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent. The petitioner may, however apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds :

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery ;

(ii) that such person is dead ;

(iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ;

(iv) for any other sufficient reasons the Court may deem fit to consider.

(b) In every petition under Section 13 (2) (i) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Section 11 of the Act on the ground that the condition in Section 5 (1) is contravened, the petitioner shall make the spouse alleged to be living at the time of marriage a co-respondent.

6. **Verification of petition.**—Statements contained in every petition shall be verified by the petitioner or some other competent person in a manner required by the Code of Civil Procedure for the time being in force for the verification of plaints.

7. **Forms of application.**—The petitions made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869 (IV of 1869).

8. **Application for leave under Section 14 of the Act.**—(1) Where any party to a marriage desires to present a petition for divorce within three years (now one year) of such marriage, he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing proper court-fee under the law and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such application may, unless the Court otherwise directs, be given by affidavit.

(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week

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of the date of the said order shall file sufficient number of copies of application for leave and order of the Court thereon of the petition for divorce for service upon the respondents in the petition.

9. Service of copy of application for and order granting leave on the respondents and procedure after service.—(1) When the Court grants leave under the preceding rule a copy of the application for leave and order granting leave shall be served on each of the respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained ; he or she shall set forth in his or her written statement the grounds with the particulars on which the grant of leave is sought to be contested.

(b) The court may, if it so deems fit, frame, try and decide the issue as to the propriety of the leave granted as a preliminary issue.

10. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent, or co-respondent to file his or her statement in Court, within a period of four weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition within the aforesaid period.

11. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of Civil Procedure Code :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

12. Written statement in answer to petitions by respondent.—The respondent may and, if so required by the Court, shall present a written statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to such written statements. In particular if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty, or desertion, the written statement shall state the particulars of such adultery, cruelty, or desertion.

13. Intervener's petitions.— (1) Unless the Court for good cause shown otherwise directs, where the written statement of the respondent alleged adultery by the petitioner with a named man or woman, a certified copy of such statement or such material portion containing such allegation shall be served on such man or woman accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the petition.

(2) **Costs regarding intervention.**— (a) Whenever the Court finds that an intervener had no sufficient grounds for intervening, it may order the intervener to pay the whole or any part of the costs occasioned by the application to intervene.

(b) When the Court finds that the charge or allegation of adultery against the intervener made in any petition on written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the cost of intervention.

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14. **Answer.**—A person to whom leave to intervene has been granted, may file in the Court an answer to written statement containing the charges or allegations against such intervener.

15. **Mode of taking evidence.**—The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined like any other witnesses :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined, by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

16. **Costs.**—Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent and the adultery has been established, the court may order the co-respondent to pay the whole or any part of the costs of the proceeding :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery, reason to believe the respondent to be married person.

17. **Application for limony and maintenance.**—(a) Every application for maintenance *pendente lite*, permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children, shall state the average montly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other moveable and immoveable property owned by them, the number of dependents on the petitioner and the respondent and the names and ages of such dependents.

(b) Such application shall be supported by an affidavit of the applicant.

18. **Taxation of costs.**—Unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed a suit.

19. **Order as to costs.**—The award of costs shall be within the discretion of the Court.

20. **Transmission of certified copy of the decree.**—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Registrar of Marriages in charge of the Hindu Marriage Register, if any, or in charge of the Register maintained under the Bombay Act V of 1954.

21. **Applicability of the rules of the City Civil Court, Bombay.**—Where any applications or petitions under the Act are filed in the City Civil Court, Bombay, the rules of that Court except in so far as they are inconsistent with the Act, and these rules shall apply to such applications or petitions.

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4. CALCUTTA HIGH COURT

THE HINDU MARRIAGE ACT (CALCUTTA HIGH COURT) RULES, 1957

1. These rules may be called the Hindu Marriage Act (Calcutta High Court) Rules, 1957.

2. In these rules, unless there is anything repugnant in the subject or context, —

The "Court" means the Judge sitting in Court.

3. (i) Where a petition for dissolution of a marriage by a decree of divorce is presented before the expiry of three years from the date of the marriage, the petitioner shall ask for the leave of the court to present the petition by a separate application.

(ii) Every such application shall state in full the facts on which the petitioner wishes to rely for proof of the ground of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent, and shall also contain full particulars of the children of the marriage including age, sex and the place where, or the person or persons with whom, they are living. Such statement shall be fully verified by the applicant personally and when it is not so verified but verified by a different person, the reason therefor shall be stated :

Provided that if, before this rule comes into force, any petition for divorce has already been presented before the expiry of three years from the date of the marriage, the court will deal with such petition in such manner as it deems fit.

4. (i) The rules as regards the institution and trial of suits and as regards the execution of decrees and orders on the Original Side of the High Court shall apply, in so far as they are applicable, and shall be deemed to have always applied, to proceedings under the Hindu Marriage Act instituted on the Original Side of the High Court.

(ii) The City Civil Court Rules, 1956, shall apply, in so far as they are applicable, and shall be deemed to have always applied, to proceedings under the Hindu Marriage Act instituted in the City Civil Court.

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5. GAUHATI HIGH COURT

HINDU MARRIAGE AND DIVORCE RULES, 1955

No. HC XI—3/53/1429-R. C.—The High Court of Assam has been pleased to make the following Rules under Sections 14 and 21 of Hindu Marriage Act, 1955 (Act XXV of 1955). The rules will take effect from the date of publication in the Assam Gazette.

1. **Short title.**—These Rules may be called the Hindu Marriage and Divorce Rules, 1955.

2. **Definitions.**—(i) 'Act' means the Hindu Marriage Act, 1955 (Act XXV of 1955).

(ii) "Code" means the Code of Civil Procedure, 1908.

(iii) "Court" means the court mentioned in Section 3 (b) of the Act.

3. (i) Every petition under the Act shall be accompanied by certified extract from Hindu Marriage Register maintained under Section 8 of the Act.

(ii) Every petition for divorce on any of grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

4. **Contents of petition.**—In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status and domicile of wife, and husband, before and after the marriage ;

(c) the principal permanent address where the parties lived including the address where they last resided together ;

(d) whether there is living any issue of the marriage and if so, the names and dates of birth or ages of such issues—

(i) in every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained ;

(ii) in every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women, or for judicial separation on the ground that her husband has committed adultery with any woman or women, the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained ;

(e) whether there have been in any court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

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(f) the matrimonial offence or offences charged set out in separate paragraphs with the time and place of its or their alleged commission ;

(g) property mentioned in Section 27 of the Act, if any ;

(h) the relief or reliefs prayed for.

5. **Necessary parties.**—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds :

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery ;

(ii) that such person is dead ;

(iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ;

(iv) for any other sufficient reason that the Court may deem fit to consider.

(b) In every petition under Section 13 (2) (i) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Section 11 of the Act on the ground that the condition in Section 5 (1) is contravened, the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

6. **Verification of petition.**— Statements contained in every petition shall be verified by the petitioner or some other competent person in a manner required by the Code.

7. **Forms of petition.** - The petitions made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869 (IV of 1869).

8 **Application for leave under Section 14 of the Act.**—(1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the proper court-fee under the law and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) Evidence in such application may, unless otherwise directed by the Court, be given by affidavit.

(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week

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of the date of the said order shall file sufficient number of copies of application for leave and order of the Court thereon and of the petition for divorce for service upon the respondents in the petition.

9. Service of copy of application for and order granting leave on the respondents and procedure after service.—(1) When the Court grants leave under the preceding rule a copy of the application for leave and order granting leave shall be served on each of the respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The court may, if it deems fit, frame, try and decide the issue as to the propriety of leave granted as a preliminary issue.

(c) The Court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

10. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent, or co-respondent to file his or her statement in Court, within a period of four weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition within the aforesaid period.

11. Service of petitions.—Every petition and notice under the Act shall be served upon the party affected thereby in the manner provided for service of summons under Order V of the Code :

Provided that the Court may dispense with such service altogether if it seems necessary or expedient so to do.

12. Written statements in answers to petitions by respondents.—The provisions of Order VIII of the Code shall apply *mutatis mutandis* to the written statements if any, presented by the respondent in answer to the petition. In particular, if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion.

13. Intervener's petition.– (1) Where the written statement of the respondent alleges adultery by the petitioner with a named man or woman, a certified copy of such statement or such material portion thereof containing such allegation shall be served on such man or woman accompanied by a notice that such person is entitled within the time specified in the notice to apply for leave to intervene in the cause unless the Court for good cause shown otherwise directs.

(2) (a) **Cost regarding intervention.**– Whenever the Court finds that an intervener had no sufficient grounds to intervene, it may order the intervener to pay the whole or any part of the costs occasioned by the application to intervene.

(b) When the Court finds that the charge or allegation of adultery against the intervener made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the costs of intervention.

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14. Answer.—A person to whom leave to intervene has been granted, may file in the Court an answer to written statement containing the charges or allegations against such intervener.

15. Mode of taking evidence.—Any party may offer himself as a witness, and shall be examined and may be cross-examined like any other witness in all proceedings before the Court, and where their attendance can be had, shall be examined orally :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit but the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined orally, by or on behalf of the opposite party by whom such affidavit was filed and after such cross-examination may be re-examined orally as aforesaid.

16. Costs.—Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent and the adultery has been established, the court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery, reason to believe the respondent to be a married person.

17. Applications for alimony and maintenance.—(a) Every application for maintenance *pendente lite*, permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other movable and immovable property owned by them, the number of dependents on the petitioner and the respondent and the names and ages of such dependents.

(b) Such application shall be supported by an affidavit of the applicant.

18. Taxation of costs.—Unless otherwise directed by the Court, the cost of the petition under the Act shall be costs as taxes in a suit.

19. Order as to costs.—The award of costs shall be within the discretion of the Court.

20. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Court of Marriages in charge of the Hindu Marriage Register.

21. Appeals.—(1) All decrees and orders made by the court in any proceeding under this Act may be appealed from under any law for the time being in force.

(2) Appeals to the High Court shall be governed by the Rule of the High Court as far as they may be applicable.

(3) In every such appeal notice shall be issued to the parties interested.

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6. KARNATAKA HIGH COURT

THE HINDU MARRIAGE RULES, 1956[1]

'The Act' referred to in these Rules shall mean the Hindu Marriage Act, 1955.

1. **Form of proceedings.**—The following proceedings under the Act shall be instituted by original petitions which shall be numbered serially as Miscellaneous Petitions as (H. M.).Mis. No.....of 19.....

(i) under Section 2, for restitution of conjugal rights ;

(ii) under sub-section 1) of Section 10, for judicial separation ;

(iii) under sub-section (1) of Section 10, for rescinding a decree for judicial separation ;

(iv) under Section 11, for declaring a marriage null and void ;

(v) under Section 12, for annulment of a marriage by a decree of nullity ;

(vi) under Section 13, for divorce ;

(vii) under Section 14, for leave to present a petition for divorce before the expiration of three years from the date of marriage.

2. **Interlocutory applications.**—Every other proceeding in the same matter subsequent to the petition shall be initiated by an interlocutory application.

3. **Cause title.**—Every petition, application, affidavit, decree or order under the Act shall be headed by a cause title in Form No. 1 and shall set forth the provision of the Act or of the Rules under which it is made.

4. **Contents of petition.**—(1) In addition to the particulars specified in Section 20 of every petition shall state—

(i) the names of parties and their occupation and the place and address where the parties reside or last resided together within the jurisdiction of that Court ;

(ii) the names of children, if any, of the marriage together with their dates of birth or ages ;

(iii) if prior to the date of petition there has been any proceeding under the Act between the parties to the proceedings, full particulars thereof ;

(iv) if the petition is for restitution of conjugal rights, the date on or from which and the circumstances under which the respondent withdrew from, or terminated conjugal relationship with the petitioner ;

(v) if the petition is for judicial separation or divorce the matrimonial offence alleged on other grounds upon which the relief is sought, together with full particulars thereof so far as such particulars are known to the petitioner viz.,

1. R. O. C. 1277-55, dated the 27th day of March, 1956.

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(a) in a case of alleged desertion, the date and the circumstances under which it began ;

(b) in a case of alleged cruelty, the circumstances under which it was committed and the reasons for the apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party ;

(c) in a case of alleged virulent form of leprosy or venereal disease the date and the period from which it began together with the nature and the period from curative steps taken ;

(d) in a case of alleged unsoundness of mind, the date and the period from which it began together with the nature and period of curative steps taken and a statement whether such unsoundness of mind has been found and declared in any proceedings in a court of law.

(2) Every petition shall set out at the end the relief or the reliefs sought for.

5. Copies for service with process.- The petitioner shall along with every petition furnish a copy for service on the respondent together with the fee prescribed for issue of notices under the Court Fees Act in force.

6. Leave to present a petition before expiration of three years.—Every petition under Section 14 of the Act for leave to present a petition for divorce before the expiration of three years from the date of marriage shall be supported by an affidavit setting forth the circumstances relied on as constituting exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent.

7. Notice of petition.—(1) Notice of the petition shall be in Form No. 11 and shall require the respondent to enter appearance in person or by pleader and file a written statement not less than seven days before the date fixed for hearing in the notice.

(2) The notice together with a copy shall be served on the respondent in the manner prescribed for the service of summons in suits under Order V of the Code of Civil Procedure, 1908.

8. Decree under Sections 9, 11, 12 and 13.- Every decree under Sections 9, 11, 12 and 13 shall be drawn up in Form No. III and shall be signed by the District Judge, under his hand and seal.

9. Custody of children.—The petitioner or the respondent spouse or the guardian of any children of the marriage may at any time either before or after the decree apply to the Court for order relating to the custody or education of the children of the marriage and the court may pass such orders as may be deemed fit and appropriate subject to the provisions of Section 26 of the Act.

10. Costs and pleader's fee.—The order as to costs of the proceedings shall be in the discretion of the Court and be taxed in the decree. The Court shall have discretion to fix the pleader's fee in the proceedings subject to a minimum of Rs. 10 and a maximum of Rs. 50.

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11. Security for costs.—(1) The wife who is petitioner or who has entered an appearance to a petition may apply to the Court for security for her costs of the proceedings.

(2) At the hearing of an application for a commission to examine a witness within or outside the jurisdiction of the court or at any time, after such an examination is granted, a wife who is a petitioner or who has entered an appearance to a petition may apply for security for her costs of and incidental to such examination.

(3) When an applicatian for security has been made under this Rule, the Court shall ascertain what is a sufficient sum of money to cover the costs of the wife, and if, after taking all the circumstance into account, including the means of the husband and the wife, it considers that the husband should provide security for all or some of the wife's costs it may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as it may fix and may direct a stay of the proceedings until the order is complied with.

12. The rule of the High Court in respect of appeals from orders/decrees shall apply to all appeals preferred under the Act. Such appeals shall be numbered serially as (H. M.) Mis.....Appeal.....of 19.....

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7. KERALA HIGH COURT

HINDU MARRIAGE (KERALA) RULES, 1963[1]

In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Central Act 25 of 1955) and Article 227 of the Constitution of India and all other powers hereunto enabling the High Court of Kerala hereby makes the following rules with the previous approval of the Governor to regulate proceedings under the said Act.

1. **Short title.**—These rules may be called the Hindu Marriage (Kerala) Rules, 1963.

2. **Commencement.**—These rules shall come into force on the date of their publication in the Gazette.

3. **Definitions.**—In these rules unless there is anything repugnant in the subject or context,—

(a) "Act" means the Hindu Marriage Act, 1955 (Central Act 25 of 1955).

(b) "Code" means the Code of Civil Procedure, 1908.

(c) "Court" means the Court mentioned in Section 3 (b) of the Act.

(d) "Form" means a form appended to these rules.

(e) All other words and expressions used herein but not defined shall have the meaning respectively assigned to them in the Act.

4. **Certified extract etc. to accompany petitions.**—(i) Every petition under the Act shall be accompanied by a certified extract form the Hindu Marriage Register maintained under Section 8 of the Act and, in the absence of the same, by an affidavit to the effect that the petitioner was married to the respondent.

(ii) Every petition for divorce on any of the grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act[2] shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

5. **Form of proceedings.**—The following proceedings under the Act shall be initiated by original petition :—

(i) under Section 9 for restitution of conjugal rights ;

(ii) under sub-section (1) of Section 10 for judicial separation ;

(iii) under sub-section (2) of Section 10 for rescinding a decree for judicial separation ;

(iv) under Section 11 for declaring a marriage null and void ;

(v) under Section 12 for annulment of a marriage by a decree of nullity; and

(vi) under Section 13 for divorce.

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1. No. B 1 - 1827/62-A, dated 24th July, 1963.

2. Now clause (i) of Section 13 (1-A).

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6. **Clause title.**—Every petition, application, decree or order under the Act shall be headed by a Cause of Title in Form No. 1 and shall set forth the provision of the Act under which it is made.

7. **Contents of petition.**—(1) In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage, or divorce shall contain the following particulars :—

(a) the place and the date of the marriage, the names of the parties and their occupation, the place and address where the parties raside or last resided together within the jurisdiction of the Court ;

(b) the name, status and domicile of the wife and husband before and after the marriage ;

(c) whether there is living any issue of the marriage and if so, the name and date of birth or age of such issue, or all such issues ;

(d) whether there have been any previous proceedings in any Court in India with reference to the marriage, by or on behalf of either of the parties and if so what proceedings and the result of such proceedings ;

(e) the matrimonial offences or offences if any charged, set out in separate paragraphs, with the time and place of the alleged commission ;

(f) the property mentioned in Section 27 of the Act if any ; and

(g) the relief or reliefs prayed for.

(2) If the petition is for restitution of conjugal rights, the date from which and the circumstances under which the respondent withdrew from the society of the petitioner shall be stated in the petition.

(3) In cases where desertion and/or cruelty are alleged, the petitioner shall state the date and the circumstances under which the alleged desertion began and/or the specific acts of cruelty.

(4) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has, after the solemnization of the marriage, had sexual intercourse with any person or persons other than him, *the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained.

(5) In every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation on the ground that her husband has after the solemnization of the marriage, had sexual intercourse with any person or persons other than her,* the petitioner shall state the name, occupation and place of residence of such woman or women so far as they can be ascertained.

8. **Full particulars to be given.**—In cases where respondent is alleged to be suffering from a virulent form of leprosy or venereal disease in a communicable form, or unsoundness of mind, full particulars as to when such ailment

*Now for either remedy on the ground of extra-marital sex.

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began to manifest itself and the nature and period of any curative steps taken, shall be given.

(2) In any petition for divorce on the ground of adultery, the petitioner shall be required to give particulars, as clearly as he can, of the acts of adultery alleged to have been committed by the respondent.

9 **Affidavit on non-cohabitation.**—A petition for divorce after the passing of a decree for judicial separation shall be accompanied by an affidavit made by the petitioner to the effect that he or she has not resumed cohabitation for a period of two years* or upwards after the passing of the decree for judicial separation.

10. **Presetation of petition.**—Every petition or application under the Act shall be presented to the Court in person or through an advocate or a Pleader or a recognised agent.

11. **Necessary parties.**—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has, after the solemnization of the marriage; had sexual intercourse with any person,** the petitioner shall made such person a co-respondent.

(b) In every petition under Section 13 (2) (i) of the Act the petitioner shall make "the other wife" mentioned in that section a co-respondent.

(c) In every petition under Section 11 of the Act on the ground, that the condition in Section (5) (i) contravened the petitioner shall make the spouse of the respondent alleged to be living at the time of the marriage a co-respondent.

(d) The petitioner may, however apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of the co-respondent in cases covered by sub-rule (a) above on any of the following grounds—

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery,

(ii) that such person is dead,

(iii) that the respondent being the wife is leading the life of a prostitute and the petitioner knows of no person with whom she has committed adultery or has had sexual intercourse,

(iv) for any other reason that the Court may deem fit and sufficient to consider.

12. **Verification of petitions.**—Statement contained in every petition or written statement shall be verified in the manner required by the Code.

13. **Application for leave under Section 14 of the Act.**—(1) Where any party to a marriage desires to present a petition for divorce within three years* of such marriage, he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition for div rce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the proper court fee under the law, and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner

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* Now one year.

** Now either remedy on the ground of extra-marital sex.

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setting cut the particulars of exceptional hardship to the petitioner, or exceptional depravity on the part of the respondent on which leave is sought.

(3) Evidence in such application may, unless otherwise directed by the court, be given by affidavit.

(4) When the Court grants leave the petition shall be deemed to have been duly filed on the date of the said order. The petitioner shall within a week of the date of the said order, file sufficient number of copies of the petition for divorce, for service upon the respondents in the petition.

14. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice which shall be in Form No. II. shall be accompanied by a copy of the petition and affidavit in support thereof. The notice shall, unless the Court otherwise directs, require the respondent and the co-respondent to file their written statements within a period of four weeks from the date of service of notice and to service a copy of the same upon each of the other parties to the petition within the aforesaid period.

15. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of the Code.,

16. Contents of written statement.—The provisions of Order VIII of the Code shall apply *mutatis mutandis* to the written statement, if any, presented by the respondent or the co-respondent in answer to the petition.

17. Application for alimony and maintenance.—Every application for maintenance *pendente lite* permanent alimony and maintenance and education expenses of minor children shall state the average monthly income of the petitioner and the respondent, the source of their income particulars of all movable and immovable property owned by them, the number of dependents on them and their names and age.

18. Form of decree.—Every decree under the Act other than a decree of the High Court shall be drawn up in Form No. III and shall be signed by the Judge under his hand and seal.

19. Transmission of certified copy of the decree.— The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Registrar of Marriages maintaining the Hindu Marriage Register.

20. Costs.— (a) Unless otherwise directed by the Court the costs of a petition under the Act shall be taxed as in a suit.

(b) Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute ; or

(ii) if the co-respondent had not, at the time of the adultery reason to believe that the respondent was a married person.

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8. MADHYA PRADESH HIGH COURT

RULES UNDER THE HINDU MARRIAGE ACT, 1955[1]

Rules made by M. P. High Court under the Hindu Marriage Act, XXV of 1955

In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act 25 of 1955), the Court has made the following rules to regulate proceedings under the said Act.

RULES

1. Every petition under the Hindu Marriage Act (Act XXV of 1955), hereafter called the 'Act', shall be accompanied by a certified copy of extract from the Hindu Marriage Register maintained under Section 8 of the Act or from the Register of Marriage maintained under any other Act where the marriage has been registered under some other Act and where a certified copy of extract can be granted to petitioner.

2. **Contents of petitions.**—Every petition shall state—

(1) the name of the court in which the petition is presented;

(2) the names of the parties, their ages, description and places of residence;

(3) the place and date of marriage;

(4) the principal address at which the parties to the marriage reside or last resided, together within the jurisdiction of the Court;

(5) whether there is any living issue of the marriage, and if so, the names and dates of birth or ages of such issues;

(6) whether there have been in any Court in India previous proceedings with reference to the marriage by or on behalf of either of the parties, and if so, the particulars and the result of such proceedings;

(7) details of the facts specified in Section 20 (1) of the Act so far as they are known to the petitioner. In particular, the details shall include—

(a) if the petition is for restitution of conjugal rights, the date when and the circumstances in which the respondent withdrew from the society of the petitioner;

(b) if the petition is for the judicial separation—

(i) the date and place of the desertion, cruelty, or sexual intercourse which is made the ground for relief and in case of sexual intercourse, the name and address of the person or persons with whom the respondent had sexual intercourse;

(ii) the period of leprosy, venereal disease or unsoundness of mind which is made the ground for relief;

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1. M. P. Rajpatra, Pt. 4 (G), dated 7th May, 1975, pages 375-77.

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(c) if the petition is for decree of nullity on the ground of contravention of clause (i) of Section 3 of the Act, the name and address of the spouse ;

(d) if the petition is for a decree of nullity on the grounds specified in clause (c) of Section 12 of the Act, date and particulars of the force or fraud, as the case may be, by which the consent was obtained and the date on which the force ceased to operate or the fraud was discovered ;

(e) if the petition is for divorce on the ground of—

(i) conversion, unsoundness of mind, leprosy, venereal disease, renunciation of the world or another marriage, the date and place of the act or disease ;

(ii) adultery, rape or sodomy, the date and the place of the act or acts and the name and address of the person or persons with whom these acts were committed by the respondent ;

(iii) presumption of death, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, the date when and the place where the respondent was last seen or heard of and the steps which have been taken to trace the respondent ;

(8) the property mentioned in Section 27 of the Act, if any relief is claimed in respect thereof ;

(9) relief or reliefs.

3. **Application for leave under Section 14 of the Act.**—Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall apply by an application for leave of the Court—

(1) The application shall be accompanied by the petition intended to be filed.

(2) The application shall be supported by an affidavit made by the applicant and shall state the following particulars :

(a) the grounds on which the application is made ;

(b) particulars of the hardship or depravity alleged ;

(c) whether there has been any previous application of this purpose, if so, its details ;

(d) whether there are living any children of the marriage, and if so, their names and dates of birth or ages, and where and with whom they are residing ;

(e) whether any, and if so, what attempts at reconciliation have been made ;

(f) any other circumstances which may assist the Court to determine the question whether there is reasonable probability of a reconciliation between the parties.

(3) Notice of the application along with the copy of the application and of the petition shall be served on the respondent.

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(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order.

4. Application for alimony and maintenance.—Every application for alimony and maintenance shall be supported by an affidavit made by the applicant and shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other movable and immovable property owned by them, the number of dependents of the petitioner and the respondent, and the names and ages of such dependents.

5. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period specified by the Court along with a copy for the use of the petitioner.

6. Service of petitions.– Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of the Civil Procedure Code.

7. Taxation of costs.—Unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed in a suit.

8. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree of nullity or divorce to the Registrar in charge of the Hindu Marriage Register maintained under the Act or to the officer in charge of the Marriage Register maintained under any other Act containing an entry about the marriage annulled or dissolved by the decree.

9. Appeals.– Appeals to the High Court from the decree and orders of the District Court shall be governed by the Rules of the High Court as far as may be applicable.

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9. MADRAS HIGH COURT

RULES UNDER THE HINDU MARRIAGE ACT, 1955

Rules to regulate proceedings under the Hindu Marriage Act, 1955

(Central Act 25 of 1955)

In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Central Act 25 of 1955) and Article 227 of the Constitution of India and all other powers hereunto enabling and with the previous approval of the Governor, the High Court hereby makes the following rules to regulate proceedings under the said Act and they will come into force on the date of publication in the Fort St. George Gazette :

1. **Form of proceedings.**—The following proceedings under this Act shall be initiated by original petitions :

(i) Under Section 9 for restitution of conjugal rights ;

(ii) Under sub-section (1) of Section 10 for judicial separation ;

(iii) Under sub-section (2) of Section 10 for rescinding a decree for judicial separation ;

(iv) Under Section 11 for declaring a marriage null and void ;

(v) Under Section 12 for annulment of a marriage by a decree of nullity ;

(vi) Under Section 13 for divorce ;

(vii) Under Section 26 to make orders and provisions with respect to the custody, maintenance and education of children.

2. Every other proceeding subsequent to the petition shall be by an interlocutory application.

3. Every petition, application, affidavit, decree or order under the Act shall be headed by a cause title in Form No. 1 and shall set forth the provision of the Act under which it is made.

4. **Contents of petitions.**—(1) Every petition shall state—

(i) the place and the date of the marriage, the names of the parties and their occupation, the place and address where the parties reside or last resided together within the jurisdiction of the Court ;

(ii) the names of the children, if any, of the marriage together with their dates of birth or ages ;

(iii) if prior to the date of the petition, there has been any proceeding under the Act between the parties to the petition, the full particulars thereof ;

(iv) if the petition is for restitution of conjugal rights, the date on or from which and the circumstances under which the respondent withdrew from the society of the petitioner ;

(v) if the petition is for judicial separation, the matrimonial offence alleged or other grounds upon which the relief is sought, together with full particulars thereof so far as such particulars are known to the petitioner, e. g.,

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(1) in the case of alleged desertion, the date and the circumstances under which it began ;

(2) in the case of cruelty or sexual intercourse with any person other than his or her spouse, the specific act of cruelty or sexual intercourse and the occasion when and the places where such acts were committed together with the name and address of the person or persons with whom the respondent had sexual intercourse ;

(3) in the case of virulent leprosy or venereal disease in a communicable form, when such ailment began to manifest itself, the nature and the period of the curative steps taken together with the name and address of the person who treated for such ailment and in the case of venereal disease that it was not contracted from the petitioner ;

(4) in the case of unsoundness of mind, the time when such unsoundness began to manifest itself, the nature and period of any curative steps together with the name and address of the person who treated for such unsoundness of mind ;

(vi) if the petition is for divorce, the matrimonial offence alleged or other grounds upon which the relief is sought together with the full particulars thereof so far as such particulars are known to the petitioner, e. g.,

(1) in the case of adultery, the specific act of adultery and the occasion when and the place where such acts were committed together with the name and address of the person with whom such adultery was committed ;

(2) in the case of incurable unsoundness of mind, the time when such unsoundness began to manifest itself, the nature and period of any curative steps taken together with the name and address of the person who treated for such unsoundness of mind ;

(3) In the case of virulent and incurable form of leprosy or venereal disease in a communicable form when such ailment began to manifest itself the nature and the period of any curative steps taken together with the name and address of the person who treated for such ailment ;

(4) in case of presumption of death, the last place where the parties lived together and the date when and the place where the respondent was last seen or heard of as alive and the steps, if any, taken to ascertain his or her whereabouts ;

(vii) if the petition is for a decree of nullity of marriage on the grounds specified in clause (c) or clause (d) of Section 12 of the Act, the time when the facts relied on where discovered and whether or not marital intercourse with the consent of the petitioner took place after the discovery of the said facts.

(b) The petition shall set out at the end the relief or reliefs sought including any claim for—

(i) custody, care and maintenance of children :

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(ii) permanent alimony and maintenance ;

(iii) costs.

Where a claim is made under clause (ii) above the petition shall specify the annual or capital value of the respondent's property, the amount of his annual earnings and other particulars relating to his or her financial resources and the particulars relating to the petitioner's income and other property.

5. **Contents of written statement.**— Every witten statement in answer to a petition for restitution of conjugal rights shall set out the particulars, as far as may be, set out in clauses (v), (vi) and (vii) of sub-rule (a) of Rule 4.

6. An application under the proviso to Section 14 of the Act for leave to present a petition for divorce before three years have passed from the date of the marriage, shall be supported by an affidavit setting forth the circumstances relied on as constituting exceptional hardship to the petitioner or exceptional depravity on the part of the respondent.

7. When a petition is admitted, the Ministerial officer of the court shall assign a distinctive number to the petition and all subsequent proceedings on the petition shall bear that number.

8. Along with the petition the petitioner shall furnish a copy thereof for service on the respondent and if a co-respondent has been impleaded, an additional copy for service on him, together with the fee prescribed under the Madras Court-fees and Suits Valuation Act, 1955, for service of notices.

9. (i) Notice of the petition shall be in Form No. II for settlement of issues and shall require the respondent and the co-respondent, if one is named in the petition to enter appearance in person or by pleader and file a written statement not less than seven days before the date fixed in the notice.

(ii) The notice together with a copy of the petition shall be served on the respondent and the co-respondent, if named, in the manner prescribed for service of summons in suits not less than 21 days before the date appointed therein.

10. Appeals to the High Court from the decree and orders of the District Court shall be governed by the Rules of the High Court, Madras Appellate side, as far as they may be applicable.

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10. ORISSA HIGH COURT

RULES UNDER THE HINDU MARRIAGE ACT, 1955

1. **Short title and commencement.**—(i) These rules may be called the Hindu Marriage and Divorce Rules, 1956.

(ii) These Rules shall come into force with immediate effect :

Provided that nothing contained in these rules will effect the validity of any pending proceeding under the Act, but the petitions already filed under the Act shall be made consistent with these rules by necessary amendment or remedy of the defects within a time fixed by the Court.

2. **Definition.**—(i) "Act" means the Hindu Marriage Act, 1955 (Act 25 of 1955).

(ii) 'Code' means the Code of Civil Procedure, 1908.

(iii) 'Court' means the Court mentioned in Section 3 (b) of the Act.

3. **Proceedings under the Act and petitions.**—(a) Every proceeding under the Act shall be registered as a suit.

(b) Every petition for divorce on any of the grounds mentioned in clause VIII of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights, as the case may be.

4. **Contents of petitions.**—In addition to the particulars required to be given under Order 7, Rule 1 of the Code of Civil Procedure and Section 20 of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status and domicile of the wife and husband, before and after the marriage ;

(c) the principal permanent address where the parties cohabited including the address where they last resided together ;

(d) whether there is living any issue of the marriage and, if so, the names and dates of birth or ages of such issues :

(i) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons so far as they can be ascertained ;

(ii) In every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation, on the ground that her husband has committed adultery with any woman or women, the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained ;

(e) whether there have been in any Court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

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(f) the matrimonial offence or offences charged, set out in separate paragraphs with the time and place of its or their alleged commission ;

(g) property mentioned in Section 27 of the Act, if any ;

(h) the relief or reliefs prayed for.

5. Necessary parties.—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery or has committed adultery with any person, the petitioner shall make such person a co-respondent. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds :—

(i) that the name of person is unknown to the petitioner although he has made efforts for discovery ;

(ii) that such person is dead ;

(iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ;

(iv) for any other sufficient reason the Court may deem fit to consider.

(b) In every petition under Section 11 of the Act on the ground that condition in Section 5 (1) is contravened, the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

(c) In every petition under Section 13 (2) (i) of the Act the petitioner shall make 'the other wife' mentioned in the section a co-respondent.

6. Application for leave under Section 14 of the Act.— (1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall obtain leave of the court under Section 14 of the Act on *ex parte* application made to the court in which the petition for divorce is intended to be filed.

(2) The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such an application may, unless the court otherwise directs, be given by affidavit.

(4) When the court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week of the date of the said order shall file sufficient number of copies of application for leave and order of the court thereon and of the petition for divorce for service upon the respondent in petition.

7. Service of copy of application for and order granting leave on the respondents and procedure after service.—(1) When the court grants leave under the preceding rule, a copy of the application for leave and order granting shall be served on each of the respondents along with the notice of the petition for divorce.

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(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The court may, if it so deems fit, frame, try and decide the issue as to the propriety of the leave granted as a preliminary issue.

(c) The court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

8. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of the Civil Procedure Code.

9. Written statements in answers to petitions by respondents.—The statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to such written statements. In particulars, if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion.

10. Interveners petitions.—(1) Unless the Court for good cause shows otherwise directs where the written statement of the respondent alleges adultery by the petitioner with a named man or woman a copy of such statement or such material portion thereof containing such allegation shall be served on such man or woman accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the case.

(2) Costs regarding intervention.—(a) Whenever the Court finds that an intervener had no sufficient grounds for intervening it may order the intervener to pay the whole or any part of the costs occasioned by the application to intervene.

(b) When the Court finds that the charge or allegation of adultery against the intervener made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the costs of intervention.

11. Answer.—A person to whom leave to intervene has been granted may file in the Court an answer to written statement containing the charge or allegation against such intervener.

12. Mode of taking evidence.— The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness and shall be examined, and may be cross-examined and re-examined like any other witness :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall on the application of the opposite party, or by direction of the Court,

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be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom affidavit was filed.

13. Application for alimony and maintenance.—(a) Every application for maintenance *pendente lite* permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children, shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other movable property owned by them, the number of dependents on the petitioner and the respondent, and the names and ages of such dependents.

(b) Such application shall be supported by an affidavit of the applicant.

14. Taxation of costs.—Unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed in a suit.

15. Order as to costs.—The award of costs shall be within the discretion of the Court.

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11. PATNA HIGH COURT

HINDU MARRIAGE RULES, 1956

No. 221—R, dated July 23, 1957.—The following rules framed by the High Court of Judicature at Patna under Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act 25 of 1955) are published for general information. The rules will take effect from the date of publication.

In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act 25 of 1955), the High Court of Judicature at Patna hereby makes the following rules :

1. **Short title and commencement.**—(i) These rules may be called the Hindu Marriage (Act 25 of 1955) Rules, 1956.

(ii) The rules shall come into force on the date of publication in the Bihar Gazette.

2. **Definitions.**—(i) 'The Act' means the Hindu Marriage Act, 1955 (Act 25 of 1955).

(ii) 'Court' means the court mentioned in Section 3 (b) of the Act.

3. **Form of the proceedings.**—The following proceeding under the Act shall be initiated by original petitions :—

(i) under Section 9 for restitution of conjugal rights ;

(ii) under sub-section (1) of Section 10 for judicial separation ;

(iii) under sub-section (2) of Section 10 for rescinding a decree for judicial separation ;

(iv) under Section 11 for declaring a marriage null and void ;

(v) under Section 12 for annulment of a marriage by a decree of nullity ;

(vi) under Section 13 for divorce ;

(vii) under Section 26 to make, revoke, suspend or vary an order for provision regarding the custody, maintenance or education of minor children.

4. Every other proceeding, subsequent to the original petition mentioned in Rule 3, shall be initiated by an interlocutory application.

5. Every petition, application, affidavit, decree or order under this Act shall be headed by a cause title in Form No. 1 given in the schedule to these rules with such variation as may be necessary and shall be drawn up, so far as possible, in the forms prescribed in the schedule to the Indian Divorce Act, 1869 (IV of 1869).

6. When a husband or a wife is a lunatic or an idiot, any petition under the Act other than a petition for restitution of conjugal right may be brought on his or her behalf by the person entitled to his or her custody.

7. **Petitions of Minors.**—(i) Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court ; and no peti-

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tion presented by a minor under the Act shall be filed until the next friend has undertaken in writing to be answerable for costs such undertaking shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

(ii) The next friend shall file an affidavit along with the petition, which shall state the age of the minor, that the next friend has no adverse interest that of the minor and that the next friend is otherwise a fit and proper person to act as such.

(iii) The court may on considering the affidavit and such other material as it may require, record its approval to the representation of the minor by the next friend or pass such order or orders as it may deem fit.

8. **Contents of petition.**—In addition to the particulars required to be given under Order VII, Rule 1 of the Code of Civil Procedu e, every original petition shall state—

(i) the place and the date of the marriage ;

(ii) the names of the parties and their occupation ;

(iii) the principal permanent address where the parties cohabited including the address where they last resided together ;

(iv) the names of the children, if any, of the marriage together with their dates of birth or ages ;

(v) if prior to the date of the petition there has been any proceeding between the parties to the petition with the reference to their marriage in any court in India, the result and the full particulars, thereof ;

(vi) if the petition is for restitution of conjugal rights the date on or from which and the circu nstances under which the respondent withdrew from or terminated conjugal relationship with the petitioner ;

(vii) if the petition is for judicial separation or divorce the matrimonial offence alleged or other grounds upon which the relief is sought, together with full particulars thereof so far as such particulars are known to the petitioner, e. g.—

(a) in the case of alleged desertion the date and the circumstances under which it began ;

(b) in the case of presumption of death, the last place where the parties lived together and the date when and the place where respondent was last seen or heard of as alive and the steps, if any, taken to ascertain his whereabouts ;

(c) in the case of cruelty or adultery the specific acts of cruelty or adultery and the occasions when and the places where such acts were committed ;

(d) in the case of incurable unsoundness of mind, the time when such unsoundness began to manifest itself, the nature and period of any curative steps taken together with the name and address of the person, if any, who treated for such unsoundness of mind ;

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(e) in the case of leprosy, or venereal disease in a communicable form, which such ailment began to manifest itself, the nature and the period of the curative steps, if any, taken together with the name and address of the person who treated for such ailment and whether or not such ailment was contracted from the petitioner ;

(f) in case of an allegation of fraud, a complete specification of the facts which constitute the fraud ;

(viii) if the petition is for a decree of nullity of marriage on the ground specified in clause (c) or clause (d) of Section 12 of the Act, the time when the facts relied on were discovered and whether or not marital intercourse with the consent of the petitioner took place after the discovery of the said facts ;

(ix) if the petition is by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that his wife committed adultery with any person, the name, occupation and place of residence of such person, so far as they can be ascertained ;

(x) if the petition is by a wife for divorce on the ground that the husband is living in adultery or judicial separation on the ground that her husband committed adultery with any woman, the name, occupation and place of residence of such woman, so far as they can be ascertained ;

(xi) if the petition is by the wife for divorce on the ground that her husband has been guilty of rape, sodomy and bestiality, all particulars in proof of the same, accompanied by a certified copy of judgment, if any, in case of conviction ;

(xii) if the petition is one for a decree of dissolution of marriage or of nullity or annulment of marriage or for judicial separation, that there is no collusion or connivance between the petitioner and the other party to the marriage or alleged marriage ;

(xiii) the details of the property, if any, mentioned in Section 27 ;

(xiv) set out at the end the relief or reliefs sought, including any claim for—

(a) damages against the co-respondent ;

(b) custody, care and maintenance of children ; and

(c) costs.

Where a claim is made under clause (c), the petition shall specify the annual or capital value of the husband's property, the amount of his annual earning and other particulars relating to his financial resources and also the annual or capital value of the wife's property.

9. **Verification.**—Statements contained in every petition shall be verified by the petitioner or some other competent person in the manner required by the Code of Civil Procedure for the time being in force for the verification of plaints.

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10. Application for leave under Section 14 of the Act.— (1) Where any party to a marriage desires to present a petition for divorce within three years of such marriage, he or she shall obtain leave of the court under Section 14 of the Act on *ex parte* application made to the court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the proper court fee under the law and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such application may, unless the court otherwise directs, be given by affidavit.

(4) When the court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. Within a week of the date of the said order or within such further time as may be fixed by the court, the petitioner shall file sufficient number of copies of application for leave and order of the court thereon and of the petition for divorce for service upon the respondent in the petition.

11. Service of copy of application for and order granting leave on the respondents and procedure after service.—(1) When the Court grants leave under the preceding rule a copy of the application for leave and order granting leave shall be served on each respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The Court may, if it so deems fit, frame, try and decide the issue as to the property to leave granted as a preliminary issue.

(c) The Court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

12. Every petition made under the Act shall be accompanied by a certified copy of the certificate from the Hindu Marriage Registrar, if any, prescribed by the State Government about the solemnisation of the marriage under the Act. A petition for divorce on any of the grounds mentioned in clauses (viii) and (iv) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of a decree for judicial separation or for restitution of conjugal rights, as the case may be.

13. When a petition is admitted, the Chief Ministerial Officer of the Court shall assign a distinctive number to the petition and all subsequent proceeding on the petition shall bear that number.

14. Along with the petition, the petitioner shall furnish a copy thereof for service on the respondent and if co-respondent is impleaded, an additional copy for service on him, together with the fee prescribed under the Court-fee Act for service of notices.

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15. (i) Notice of the petition shall be in Form No. II given in the schedule to these rules for settlement of issue and shall require the respondent and the co-respondent, if one is named in the petition to enter appearance in person or by pleader, and file a written statement not less than seven days before the day fixed in the notice.

(ii) The notice together with a copy of the petition shall be served on the respondent and the co-respondent, if, named in the manner prescribed in Order V of the Code of Civil Procedure not less than 21 days before the day appointed therein :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

16. **Co-respondent in husband's petition.**—In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnisation of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive a co-respondent in the said petition, unless he is excused from so doing by an order of the court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts—

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery ;

(iii) that the alleged adulterer is dead ;

(iv) for any other sufficient reason that the Court may deem fit to consider.

17. **Respondent in wife's petition.**—Unless otherwise directed, where a wife's petition allege adultery with a woman named and contains a claim for costs against her, she shall be made a respondent in the case.

18. **Intervention.**—(i) Any person other than a party to the proceeding including person charged with adultery or sodomy not made a respondent or co-respondent, shall be entitled to appear and intervene in the proceedings. The application shall be supported by an affidavit setting forth the facts on the basis on which the intervention is sought for.

(ii) Notice for the application together with a copy of the affidavit shall be served on all parties who shall be at liberty to the counter affidavit.

(iii) If, after hearing all the parties, the court grants leave, the intervener may take part in the trial subject to such terms and conditions as the Court may deem fit to impose.

(iv) If the Court is satisfied that the intervention was made without sufficient cause it may order the applicant to pay the whole or part of the costs occasioned the interevention. If on the other hand, the Court finds that the intervention is justified it may pass suitable orders for payment to the applicant the whole or any part of the costs of intervention.

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(v) A person to whom leave to intervene has been granted may file in the Court an answer to the petition or written statement containing the charges, or allegation against such intervener.

19. Written statements in answer to petition filed by respondent.—The respondents may and, if so required by the Court shall, present a written statement in answer to the petition and the provisions of Order VIII of the Code of Civil Procedure shall apply mutatis mutandis to such written statements. In particular if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion.

20. Damages.—Any husband may, in petition for divorce, claim damages from the co-respondent on the ground of his having committed adultery with the wife of such petitioner :

(i) Such petition shall be served on the said co-respondent and the wife unless the Court dispense with such service in accordance with the provisions of Rule 15.

(ii) The damages to be recovered on any such petition shall be ascertained by the Court although the respondent or either of them may not appear.

After the decision has been given, the Court may direct in what manner the damages shall be paid or applied.

21. Costs.—The Court may direct that the whole or any part of the costs of the petition for nullity of marriage or for divorce incurred by any of the parties to such petitions may be paid by any of the other parties thereto :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of adultery living apart from the husband and leading the life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery, reasons to believe the respondent to be a married woman.

The award of costs shall be in the discretion of the Court and the Court shall make an order of the same while passing the decree.

22. Unless otherwise directed by the Court, the costs of the petition under the Act shall be cost as taxed in suit under the Indian Divorce Act (VI of 1869).

23. Appeal under the Act shall be governed by the relevant rules in the Patna High Court General Rules and Circular Orders, Civil or by the Rules of the High Court at Patna, as the case may be, so far as they may be applicable.

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12. PUNJAB HIGH COURT

HINDU MARRIAGE (PUNJAB) RULES, 1956

No. 271—GEN L/XXVII—19, dated November 22, 1956.—In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act 25 of 1955), the Punjab High Court has made the following reules—

1. Short title.— These rules may be called the Hindu Marriage (Punjab) Rules, 1956.

2. Definition.—In these rule, unless, there is anything repugnant in the subject or context,—

(a) 'Act' means the Hindu Marriage Act, 1955 (No. 25 of 1955).

(b) 'Form' means a form appended to these rules.

(c) 'Section' and 'sub-section' means, respectively, section and sub-Section of the Act.

(d) All other terms and expressions used herein but not defined shall have the meaning respectively assigned to them in the Act.

3. Petition to be accompanied by extract or affidavit regarding marriage.— A petition under the Act shall be accompanied by a certified extract from the Hindu Marriage Register maintained under Section 8 of the Act and in the absence of the same an affidavit, to the effect that petitioner was married to the respondent (unless the certificate or affidavit is already on the record).

4. Contents of the petition.—All petitions under Section 9 to 13 shall state—

(i) the date and place of the marriage ;

(ii) whether the petitioner and the respondent were Hindus by religion at the time of the marriage and whether they continue to be so up to the date of the filing the petition ;

(iii) the status and place of residence of the parties to the marriage before the marriage and at the time of filing the petition ;

(iv) the principal permanent address where the parties have cohabited including the address where they last resided together ;

(v) whether there have been previous proceedings with regard to marriage by or on behalf of any party, if so, the result of those proceedings ;

(vi) whether any children were born of the marriage and if so, the date and place of birth and the name and sex of each child separately, and whether alive or dead ;

(vii) the matrimonial offences charged (set in separate patagraphs with the times and places of their alleged commission).

5. Petition to be accompanied by affidavit to show that there is no collusion or connivance.— A petition for divorce on grounds of adultery shall state that the petitioner has not in any manner been accessory to or connived at or condoned the adultery.

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6. Full facts of adultery to be given.—In any petition for divorce the petitioner shall be required to give particulars as nearly as he can of the acts of adultery alleged to have been committed by the respondent or respondents as the case may be.

7. Affidavit of non-cohabitation for divorce after decree of judicial separation.—A petition for divorce after the passing of a decree for judicial separation shall be accompanied by an affidavit made by the petitioner to the effect that he or she has not resumed cohabitation for a period of two years or upwards after the passing of a decree for judicial separation.

8. Presentation of petition.—Every petition or application under the Act shall be presented to the Court in person or through an advocate or a recognised agent.

9. Notice to respondent.—(1) A notice of every petition or application under the Act shall be issued to the respondent in Form A to appear and answer the claim on a day to be therein specified :

Provided that no such notice would be necessary when the respondent appears at the time of the presentation of the petition or applica ion.

(2) *Copies for respondent.*—Every such notice shall be accompanied by a copy of the petition or application. The required number of copies of the petition or application shall be supplied by the petitioner or applicant at the time of its presentation in Court.

10. Petition on ground of adultery : Adulterer to be impleaded as party.—Upon a petition presented by a husband for divorce on the ground of adultery, the petitioner shall make the alleged adulterer a co-respondent. The petitioner may, however, be excused from so doing on any of the following grounds with the permission of the Court—

(a) that the respondent is leading the life of a prostitute and that the petitioner knows of no particular person with whom the adultery has been committed ;

(b) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover the same ;

(c) that the alleged adulterer is dead.

11. True copy of pleadings to be served on adulterers.—Where a husband is charged with adultery with a named person a true copy of the pleadings containing such charge shall unless the Court for good cause shown otherwise directs, to be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

12. Pleading of respondents and intervener to be verified.—(a) A respondent or a co-respondent or a woman to whom leave to intervene has been granted under these rules, may file in the Court an answer to the petition.

(b) Any answer which contains matters other than a simple denial of the facts stated in the petition shall be verified in respect of such matters by the respondent, or co-respondent, as the case may be, in the manner required

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by the rules for the verification of petitions and when the respondent is husband or wife of the petitioner, the answer shall contain declaration that there is not any collusion or connivance between the parties.

(c) Where the answer of a husband alleges adultery and prays for relief a certified copy thereof shall be served upon the alleged adulterer together with a notice to appear in like manner as on a petition. When in such a case no relief is claimed the alleged adulterer shall not be made a co-respondent but a certified copy of the answer shall be served upon him together with a notice that he is entitled within the time therein specified to apply for leave to intervene in the proceedings and upon such application, he may be allowed to intervene, subject to such direction, as may then be given by the Court.

13. **Permission of Court necessary to intervene.**—Any person, not a party to the proceedings, may be permitted by the Court to intervene and show that the allegations made by the petitioner are contrary to facts and that the proceedings are collusive. Such permission shall not be granted unless the person seeking to intervene files an affidavit in support of his petition and satistfies the Court that it is proper to give such permission. Such person shall, when he firstappears in Court file a proceeding stating his or her address for service.

14. **Adulterer to pay whole or part of costs.**—Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent and the adultery has been established the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings;

Provided that the co-respondent shall not be ordered to pay the petition's costs—

(i) if the respondent was, at the time of adultery living apart from her husband and was leading the life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery, reason to believe the respondent to be a married woman.

15. **Register to be maintained.**—Every Court shall maintain a register in which the details regarding petitions shall be entered and it shall conform to Civil Register No. 111 maintained for divorce and matrimonial cases.

16. **Forms.**—The forms given in the Appendix to these rules may, with necessary modifications, be used in the proceedings under the Act.

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13. RAJASTHAN HIGH COURT

HINDU MARRIAGE AND DIVORCE RULES, 1956

Rajasthan High Court Rules, 1952

In exercise of the powers conferred by Sections 14 and 21 of the Hindu Marriage Act, 1955 (Act XXV of 1955), the Hon'ble Chief Justice and Judges are pleased to make the following rules for carrying out the purposes of the Act :

The following shall be added as Chapter XXXII-A after Chapter XXXII in the Rajasthan High Court Rules :

801-A. Short title and commencement.—(i) These rules may be called the Hindu Marriage and Divorce Rules, 1956.

(ii) These rules shall come into force on 1st June, 1956.

801-B. Definitions.—(i) 'Act' means the Hindu Marriage Act, 1955, called Act XXV of 1955.

(ii) "Code" means the Code of Civil Procedure, 1908.

(iii) "Court" means the Court mentioned in Section 3 (b) of the Act.

801-C. Petition.—Every petition under the Act shall be accompanied by a certified extract from the Hindu Marriage Register maintained under Section 8 of the Act.

801-D. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in the manner provided for service of summons under Order V of the Code :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

801-E. Contents of petitions.—(i) In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20 (1) of the Act, every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) the place and date of marriage ;

(b) the name, status and domicile of the wife and husband, before and after the marriage ;

(c) the principal permanent address where the parties cohabited including the address they last resided together ;

(d) whether there is living any issue of the marriage and if so, the names and dates of birth or ages of such issues;

(e) whether there have been in any court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings ;

(f) the matrimonial offence or offences charged set out in separate paragraphs with the time and place of its or their alleged commission ;

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(g) property mentioned in Section 27 of the Act, if any ;

(h) the relief or reliefs prayed for.

(ii) In every petition presented by a husband for divorce on the ground that his wife is living in adultery with any person or persons or for judicial separation on the ground that his wife has committed adultery with any person or persons, the petitioner shall state the name, occupation and place of residence of such persons, or persons so far as they can be ascertained.

(iii) In every petition presented by a wife for divorce on the ground that her husband is living in adultery with any woman or women or for judicial separation, on the ground that her husband has committed adultery with any woman or women, the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained.

801-F. Every petition for divorce on any of the grounds mentioned in clause (viii) or (ix) of sub-section (1) of Section 13 of the Act shall be accompanied by a certified copy of the decree for judicial separation or for restitution of conjugal rights as the case may be.

801-G. Necessary parties.—(a) In every petition for divorce or judicial separation on the ground that the respondent is living in adultery with any person, the petitioner shall make such person a co-responcent. The petitioner may, however, apply to the Court by an application supported by an affidavit for leave to dispense with the joinder of such person as a co-respondent on any of the following grounds :

(i) that the name of such person is unknown to the petitioner although he has made due efforts for discovery ;

(ii) that such person is dead ;

(iii) that the respondent being the wife is leading a life of a prostitute and that the petitioner knows of no person with whom adultery has been committed ;

(iv) for any other sufficient reason the Court may deem fit to consider.

(b) In every petition under Section 13 (2) (i) of the Act, the petitioner shall make 'the other wife' mentioned in that section a co-respondent.

(c) In every petition under Section 11 of the Act on the ground that the condition in Section 5 (1) is contravened, the petitioner shall make the spouse alleged to be living at the time of the marriage a co-respondent.

801-H. Verification of petition.—Statements contained in every petition shall be verified by the petitioner or some other competent person in the manner required by the Code for the verification of plaints.

801-I. Forms of petition.—The petitions made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869 (IV of 1869).

801-J. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice shall be accompanied by a copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period of four

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weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition within the aforesaid period.

801-K. Written statements in answers to petitions by respondents.—The respondent may, and if so required by the Court shall, present a written statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to each written statement. In particular, if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion.

801-L. Intervener's petitions.– (1) Unless the Court for good cause shown otherwise directs, where the written statement of the respondent alleges adultery by the petitioner with the named man or woman, a certified copy of such statement or such material portion thereof containing such allegation shall be served on such man or woman accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the cause.

(2) Costs regarding intervention.– (a) Whenever the Court finds that an intervener had no sufficient grounds for intervening, it may order the intervener to pay the whole or any part of the costs occasioned by the application to intervene.

(b) When the Court finds that the charge or allegation of adultery against the intervener made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the costs of intervention.

801-M. Answer.— A person to whom leave to intervene has been granted, may file in the Court an answer to written statement containing the charges or allegation against such intervener.

801-N. Mode of taking evidence.—The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally and any party may offer himself or herself as a witness, and shall be examined and may be cross-examined and re-examined like any other witness :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

801-O. Costs.– Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent and the adultery has been established, the court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs :

(i) if the respondent was at the time of the adultery living apart from the husband and leading the life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery reason to believe the respondent to be a married person.

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801-P. Application for alimony and maintenance.—(a) Every application for maintenance *pendente lite*, permanent alimony and maintenance, or for custody, maintenance and education expenses of minor children, shall state the average monthly incomes of the petitioner and the respondent, the sources of these incomes, particulars of other movable and immovable property owned by them, the number of dependents on the petitioner and the respondent and the names and ages of such dependants.

(b) Such application shall be supported by an affidavit of the applicant.

801-Q. Application for leave under Section 14 of the Act.—(1) Where any party to a marriage desires to present a petition for divorce within one year of such marriage, he or she shall obtain leave of the Court under Section 14 of the Act on *ex parte* application made to the Court in which the petition for divorce is intended to be filed.

(2) The application shall be accompanied by the petition intended to be filed bearing the proper court-fee under the law and in accordance with the rules. The application shall be supported by an affidavit made by the petitioner setting out the particulars of exceptional hardships to the petitioner or exceptional depravity on the part of the respondent on which leave is sought.

(3) The evidence in such application may, unless the Court otherwise directed, be given by affidavit.

(4) When the Court grants leave, the petition shall be deemed to have been duly filed on the date of the said order. The petitioner within a week of the date of the said order shall file sufficient number of copies of application for leave and order of the Court thereon and of the petition for divorce for service upon the respondent in the petition.

801-R. Service of copy of application for and order granting leave on the respondents and procedure after service.—(1) When the Court grants leave under the preceding rule, a copy of the application for leave and order granting leave shall be served on such of the respondents along with the notice of the petition for divorce.

(2) (a) When the respondent desires to contest the petition for divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained, he or she shall set forth in his or her written statement the grounds with particulars on which the grant of leave is sought to be contested.

(b) The court may, if it so deems fit, frame, try and decide the issue as to the propriety of leave granted as a preliminary issue.

(c) The Court may, at the instance of either party, order the attendance for examination or cross-examination of any deponent in the application for leave under the preceding rule.

801-S. Taxation of costs.—Unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed in a suit.

801-T. Orders as to costs.—The award of costs shall be within the discretion of the Court.

801-U. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Registrar of Marriages in charge of the Hindu Marriage Register.

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APPENDIX II

SPECIAL MARRIAGE RULES, 1954

Rules framed by the Bombay High Court under Section 50 of the Special Marriage Act

(Act 43 of 1954)

1. **Short title and commencement.**—(i) These Rules may be called the Special Marriage Rules, 1954.

(ii) The Rules shall come into force on the 1st January, 1955.

2. **Definition.**—(1) "Act" means Special Marriage Act, 1954.

(ii) "Code" means the Code of Civil Procedure, 1908.

(iii) "Court" means District or the City Civil Court as the case may be.

3. **Petition.**—Every petition made under the Act shall be accompanied by a certified copy of the certificate from the Marriage Certificate Book about the solemnization of the marriage under the Act.

4. **Contents of petition.**—In addition to the particulars required to be given under Order VII, R.1 of the C.P.C. every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars—

(a) The place and date of marriage.

(b) The name, status and domicile of the wife and husband before the marriage.

(c) The principal permanent address where the parties cohabited including the address where they last resided together.

(d) Whether there is living any issue of the marriage and if so the names and dates of births or ages of such issues :

(i) In every petition presented by a husband for divorce or judicial separation on the ground that his wife has committed adultery with any person or persons the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained.

(ii) In every petition presented by a wife for divorce or judicial separation on the ground that her husband has committed adultery with any woman or women the petitioner shall state the name, occupation and place of residence of such woman or women so far as they can be ascertained.

(e) Whether there has been in any court in India and if so what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings.

(f) The matrimonial offence charged set out in separate paras with the time and places of their alleged commission.

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(g) The claim for damage, if any, with particulars.

(h) If the petition is one for a decree of dissolution of marriage, or of nullity or annulment of marriage or for judicial separation, it shall further state that there is no collusion or connivance between the petitioner and the other parties to the marriage or alleged marriage.

(i) The relief or reliefs prayed for.

5. **Co-respondent in husband's petition.**—In any petition presented by a husband for divorce or judicial separation on the ground that his wife has since the solemnization of the marriage been guilty of adultery, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing by an order of the Court which may be made on any one or more of the following grounds, which shall be supported by an affidavit in respect of the relevant facts :

(i) That the respondent is leading the life of a prostitute and that the petitioner knows of no person with whom the adultery has been committed.

(ii) That the name of the alleged adulterer is unknown to the petitioner although he has made due efforts for discovery.

(iii) That the alleged adulterer is dead.

(iv) For any other sufficient reason that the Court may deem fit to consider.

6. **Verification of petition.**—Statements contained in every petition shall be verified by the petitioner or some other competent person in a manner required by the C.P.C. for the time being in force for the verification of plaints.

7. **Forms of petition.**—The petition made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869.

8. **Petitions on behalf of lunatics.**—When a husband or a wife is a lunatic or an idiot any petition under the Act other than the petition for restitution of conjugal rights may be brought on his or her behalf by the person entitled to his or her custody.

9. **Petitions by minors.**—(1) Where the petitioner is a minor he or she shall sue by his or her next friend to be approved by the Court, and no petition presented by a minor under the Act shall be filed until the next friend has undertaken in writing to be answerable for costs. Such undertaking shall be filed in Court and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

(2) The next friend shall file an affidavit along with the petition which shall state the age of the minor, that the next friend has no adverse interest to that of the minor and the next friend is otherwise a fit and proper person to act as such.

(3) The Court may on considering the affidavit and such other material as it may require record its approval to the representation of the minor by the next friend or pass such other orders as it may deem fit.

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10. Notice.—The Court shall issue notice to the respondent and co-respondent if any. The notice shall be accompanied unless otherwise directed by the Court by a certified copy of the petition. The notice shall require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period of four weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition, within the aforesaid period.

11. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in a manner provided for service of summons under Order X of the C.P.C. :

Provided that the Court may dispense with such service altogether in case it deems necessary or expedient so to do.

12. Written statements in answer to petitions by respondent.—The respondent may and if so required by the Court shall present a written statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to such written statements. In particular if in any proceeding for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty, or desertion the written statement shall state the particulars of such cruelty, adultery or desertion as required in the case of petition under clauses (d) and (f) of Rule 4 and the particulars of any relief which he claims on the same grounds.

13. Interveners in wife's petition.—(1) Unless the Court for good cause shown otherwise directs—

(a) Where the husband is charged with adultery with a named female person a certified copy of pleading or material portion thereof containing such charge shall be served upon the person with whom adultery is alleged to have been committed accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the cause.

(b) Where the written statement of the respondent alleges adultery by the petitioner with a named man or woman, as the case may be, a certified copy of such statement or such material portion thereof containing such allegation shall be served on such man or woman accompanied by a notice that such a person is entitled within the time therein specified to apply for leave to intervene in the cause.

(2) Costs regarding intervention —

(a) Whenever the court finds that the intervener has no sufficient grounds for intervening it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the costs of the intervention.

(b) Whenever the court finds that the charge or allegation of adultery against the intervener made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole or any part of the costs of intervention.

14. Answer.—A person to whom leave to intervene has been granted may file in the court an answer to the petition or written statement containing the charges or allegations against such intervener.

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15. Intervention by third party.—During the progress of the petition under clause (v) or (vi) of the Act any person suspecting that any parties to the petition are or have been acting in collusion or the petitioner has committed fraud or he has concealed some material facts from the Court for the purpose of obtaining the decree prayed for, shall be at liberty to apply to the court stating the circumstances and facts of such collusion, fraud and concealment as the case may be. The application shall be supported by an affidavit when such application is filed, the court shall give notice thereof to the parties concerned and after hearing them and taking necessary evidence pass the necessary order—

(i) If the court comes to the c nclusion that such collusion, fraud or concealment of material fact is proved, then the original petition shall be dismissed, and the intervening third party shall be awarded his costs from the perties, guilty of such collusion, fraud or concealment of facts.

(ii) Whenever such application is made and the court comes to the conclusion that the intervening third party had no grounds or no sufficient grounds for intervening, it may order him to pay the whole or any part of the costs occasioned by his intervention.

16. Competence of husband and wife to give evidence as to cruelty or desertion or judicial separation.—On any petition presented by a wife, praying for divorce or judicial separation by reason of her husband having been guilty of adultery coupled with cruelty or adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

17. Mode of taking evidence.—The witnesses in all proceedings before the court, where their attendance can be had, shall be examined orally and any party may offer himself or herself as a witness and shall be examined, and may be cross-examined and re-examined, like any other witness :

Provided that the parties shall be at liberty to verify the respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall, on the petition of the opposite party, or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

18. Damages.—Any husband may either in a petition for divorce or judicial separation, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner—

(i) Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service in accordance with the provisions of Rule No. 11.

(ii) The damages to be recovered on any such petition shall be ascertained by the said court, although the respondent or either of them may not appear. After the decision has been given, the court may direct in what manner the damages shall be paid or applied.

19. Costs.– Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent and the adultery has been

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established the court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(i) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute ; or

(ii) if the co-respondent had not at the time of adultery, reason to believe the respondent to be a married woman.

20. Taxation costs.—Unless otherwise directed by the court the costs of the petition under the Act shall be costs as taxed in suits under the Indian Divorce Act IV of 1869.

21. Order as to costs.—The award of costs shall be within discretion of the court and the court shall make an order about the same while passing the decree.

22. Power to adjourn.—The court may from time to time adjourn the hearing of any petition under the Act and may require further evidence thereon if it seems fit so to do.

23. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Marriage Officer appointed under Section 3 of the Act.

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THE SPECIAL MARRIAGE ACT (CALCUTTA HIGH COURT) RULES, 1955

1. These rules may be called the Special Marriage Act (Calcutta High Court) Rules, 1955.

2. In these rules, unless there is anything repugnant in the subject or context—

(i) the "Act" means the Special Marriage Act, 1954 (XLIII of 1954), as from time to time modified or amended ; and

(ii) the "Court" means the Judge sitting in Court.

3. Every petition for divorce or for judicial separation or for declaration of the nullity of a marriage under the Act shall be entitled "In the matter of the Special Marriage Act, XLIII of 1954", and shall be accompanied by a certified copy of the certificate of marriage, and shall state –

(i) the names, occupation and domicile of the parties to the marriage, the place of the marriage and the District Court within the local limits of whose jurisdiction such place is situated, the date of the marriage, the name and status of the wife before the marriage, the address where, and the District Court within the local limits of whose jurisdiction, the parties reside or last resided together ;

(ii) if the petition is under Section 31 (2) of the Act, the address at which the wife petitioner has ordinarily resided during the three years immediately preceding the presentation of the petition, and the length of her residence at each address, and the place of residence of the husband ;

(iii) whether there is any living issue or issues of the marriage, and, if so, the name, the date of birth or age of such child or each of such children, and also that the parentage of any living child or children of the wife born during the marriage is in dispute, if such be the case ;

(iv) whether there have been in any court any, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings ;

(v) the matrimonial offences alleged or other grounds, upon which relief is sought, setting out with sufficient particularity the times and places of the acts alleged, and other facts relied upon, but not the evidence by which they are intended to be proved ;

(vi) that there is no collusion between the petitioner and the other party to the marriage.

4. Every petition for divorce or judicial separation, as the case may be, shall state—

(i) if the petition is on the ground (h) of Section 27 of the Act, the date and the place where the respondent was last seen or heard of, and the steps which have been taken to trace the respondent ;

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(ii) if the petition is on ground (i) of Section 27 of the Act, the last place of cohabitation of the parties, and the circumstances in which they ceased to cohabit ;

(iii) where the ground of the petition is adultery, that the petitioner has not in any manner been accessory to or condoned the adultery ;

(iv) where the ground of the petition is cruelty, that the petitioner has not in any manner condoned the cruelty ;

(v) where the petition is on the ground of mutual consent, the date and the place where the parties last lived together, the addresses where each party has since lived, with the period of residence at each address, the reasons why the parties have not been able to live together, the date when the mutual agreement was arrived at, and whether such agreement is verbal or evidenced by a document in writing.

5. Every petition for divorce or judicial separation or declaration of nullity of a marriage shall conclude with a prayer setting out particulars of the relief claimed, including in the case of a petition for divorce, the amount of claim for damages, if any, and the particulars thereof, indicating the basis upon which damages have been claimed.

The prayer may also include a claim for one or more of the following reliefs :

(a) custody of the children of the marriage ;

(b) alimony pending suits ;

(c) maintenance and educational expenses of minor children.

6. Every petition for divorce under clause (i) or clause (j) of Section 27 of the Act shall be accompanied by a certified copy of the decree for judicial separation or of the decree for restitution of conjugal rights, as the case may be.

7. Every petition for judicial separation under Section 23 (1) (b) of the Act shall be accompanied by a certified copy of the relevant decree for restitution of conjugal rights.

8. Every petition for a declaration of the nullity of a marriage under clause (ii) of Section 25 of the Act shall state whether the petitioner was at the time of the marriage ignorant of the facts stated and whether marital intercourse with the consent of the petitioner has taken place since the discovery by the petitioner of the existence of the grounds for a decree.

9. Every petition for a declaration of the nullity of a marriage under clause (iii) of Section 25 of the Act shall state the date when the coercion ceased, or the fraud was discovered, and whether the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or the fraud had been discovered.

10. In every petition for divorce on the ground of adultery, the alleged adulterer shall be impleaded as a co-respondent :

Provided that the court may, on being satisfied that the petitioner has not been able to ascertain the name and identity of the alleged adulterer, excuse the petitioner from so impleading him ;

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Provided further that if after the court has so excused the petitioner the identity of the alleged adulterer is discovered, the fact must be brought to the notice of the court, and the court shall thereafter pass such order as it may think fit.

11. Every petition for divorce or judicial separation or for declaration of the nullity of a marriage shall be signed by the petitioner and where he is represented by a lawyer, also by his lawyer. For the purpose of rule, the word "lawyer' shall mean a solicitor, where the petitioner is represented by a solicitor. Such petition shall be verified in the manner required for the verification of pleadings.

12. Each summons for service on a respondent shall be accompanied by a true copy of the petition.

13. The summons shall be served on each respondent personally by delivery of a copy thereof, together with a true copy of the petition, through the Sheriff, in the High Court, and through the ordinary process-serving staff of civil courts, in all other courts.

14 Where the officer whose duty it is to serve the summons reports that the respondent refused to accept the copy of the summons presented to him, the court shall order fresh service by registered post :

Provided that the court may, where personal service cannot be effected, substitute any other mode of service as provided in Order 5, Rule 20 of the Civil Procedure Code.

15. Appearance shall, in the High Court, be entered and notified in accordance with Rules 4, 15-20 and 24 of Chapter VIII of the Rules of the Original Side and in other courts, be entered in accordance with the rules and practice for appearance in civil suits.

16. Appearance may be under protest and limited to any proceeding in the case in respect of which the party shall have received notice to appear :

Provided that (a) any appearance under protest shall state concisely the grounds of protest, and (b) the party appearing under protest shall forthwith proceed to obtain directions as to the determination of the question or questions arising by reason of such limited appearance, and in default of so proceeding, shall be deemed to have entered an unconditional appearance. Directions given upon an appearance made under protest may provide for the trial of preliminary issues, with or without stay of proceedings in the suit, or for determination of the matter in question at the hearing of the suit.

17. A respondent who has entered an appearance may file an answer to the petition, within such time as specified by rules framed by the High Court in respect of suits, or within such time as may be allowed by the court. Such answer shall be signed in the same manner as a petition and verified in manner required by law for the verification of pleadings.

18. Where in any proceeding on a petition for divorce, the respondent asks for relief under Section 35 of the Act, the answer shall contain particulars of adultery, cruelty or desertion, as if it were a petition, *mutatis mutandis*.....

19. Where in any proceeding on a petition for divorce, it appears from the answer that the respondent asks for relief under Section 35 of the Act, petitioner may file a reply thereto within fourteen days from the filing of the answer, or within such further time as may be allowed by the Court.

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20. Where the answer of a husband alleges adultery by the petitioner, such answer shall state the name, address and description of the alleged adulterer :

Provided that the court may excuse the husband from stating these particulars, if satisfied that he has been unable after his best efforts to ascertain them.

21. Where such answer prays for relief under Section 35 of the Act, a writ of summons, to which shall be annexed a true copy of the answer, shall be served on the alleged adulterer, in the same manner as a summons of a petition for divorce to be served on the respondent ; and his name with the description co-respondent in the claim under Section 35 shall be added to the title of the case. The court may however excuse compliance with this rule, if the identity or whereabouts of the alleged adulterer are not known or cannot be discovered with due diligence.

22. The alleged adulterer may, within such time from his appearance in court as may be allowed by the Court, file an answer to that of the respondent.

23. Where the answer of a husband alleges adultery by the petitioner but does not claim any relief on that ground, the answer shall be served on the alleged adulterer in the same manner as provided in Rule 21, and he may, if he so desires, enter appearance and intervene in the proceeding. If he does, his name shall appear in the title of the case "A. B. Intervener". The court may however excuse compliance with this rule if the identity or whereabouts of the alleged adulterer are not known or cannot be discovered with due diligence.

24. When a decree for divorce is passed on the ground of adultery, the court may in its discretion award such damages against the co-respondent found guilty of the adultery, as it may think fit and proper.

25. When an order is made for examination of a witness on commission on the application of the husband, the wife may apply for security for her costs of the examination at the time of the order, or subsequently.

26. At any stage of the proceeding, the wife may apply for an order on the husband to pay into court a sufficient sum of money to cover her costs of, and incidental to, the hearing of the cause and the Judge shall thereupon issue an order upon the husband to pay into court such amount as he thinks reasonable, unless he is satisfied that the wife has sufficient separate estate or that there is other good cause why such an order should not be made.

27. In all proceedings on the Original Side of the High Court, under Chapters V, VI and VII of the Act, the rules framed by the High Court for the trial of suits (including rules regarding taxation of costs), so far as they are not inconsistent with the foregoing rules, shall apply and similarly, in all proceedings in other courts the Civil Procedure Code and the Civil Rules and Orders shall apply, so far as they are not inconsistent with the foregoing rules.

28. A proceeding commenced by a petition for divorce or a declaration of the nullity of a marriage or Judicial separation or restitution of conjugal rights shall be deemed to be a suit for the purposes of the Civil Procedure Code.

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RULES UNDER THE SPECIAL MARRIAGE ACT, 1954

M. P. HIGH COURT RULES AND ORDERS

Section Two

CHAPTER XVI

No. 8266 (Nagpur, the 11th September, 1956).— In exercise of the powers conferred by Section 41 of the Special Marriage Act, 1954 (No. 43 of 1954) and all other powers hereunder to enabling the High Court of Judicature at Nagpur has made the following rules which are published for general information.

1. Short title and commencement.—(a) These rules may by called the Special Marriage Rules, 1956.

(b) They shall come into force from the date of their publication in the Madhya Pradesh Gazette.

2. Definition.—In these rules unless there is anything rupugnant in the subject or context—

"Act" means the Special Marriage Act, 1954 (No. XLIII of 1954).

3. Application of other Act and Rules.—The provisions of the Indian Divorce Act, 1869, as regards forms and procedure, in so far as such forms and procedure may be applicable *mutatis mutandis* and the rules made thereunder with necessary changes and adaptations and the general rules of Court relating to registration, contents and presentation or filing of plaints and written statements, in so far as they are not inconsistent with the Act or with these rules shall apply to all proceedings under the Act.

4. Registration of petitions.—All original petitions under Chapter V, VI or VII of the Act shall be registered as suits of Class IIIin the register of Civil Suits.

5. Contents of petitions.—A petition under Chapter V or Chapter VI of the Act shall, in addition to any particulars required by law, state—

(i) the place and date of marriage;

(ii) the name, status and domicile of the wife before the marriage;

(iii) the status of the husband and his domicile at the time of the marriage and at the time, the petition is presented, and his occupation and the place or places of residence of the parties at the time of the institution of the suit;

(iv) the principal permanent address where the parties have cohabited including the address where they last resided together;

(v) where there is living issue of the marriage, and if so, the names and date of birth or ages of such issues;

(vi) whether there have been any, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, the place of such proceedings and result of such proceedings;

(vii) the grounds on which the petitioner claims that the court to which the petition is presented has jurisdiction to entertain the petition.

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6. A petition for restitution of conjugal rights, shall, in addition to the particulars mentioned in Rule 5, state—

(i) the date from which the respondent has withdrawn from the society of the petitioner ;

(ii) the age of the respondent ;

(iii) the person or persons with whom the respondent is residing at the time of the institution of the suit ;

(iv) the attempts, if any, made before suit by the petitioner for resumption of normal relations.

7. A petition for judicial separation or divorce shall, in addition to the particulars mentioned in Rule 5, state—

(i) the specific grounds on which judicial separation or divorce is claimed ;

(ii) the claim for damages, if any ;

(iii) the absence of collusion between the petitioner and the other party to the marriage.

8. A petition for divorce by mutual consent shall, in addition to the particulars mentioned in Rule 5 state –

(i) the place or places and period or periods during which the parties have lived together ;

(ii) the period during which the parties have been living separately ;

(iii) the reasons for not being able to live together.

9. A petition for declaration of nullity of a marriage shall, in addition to the particulars mentioned in Rules 5 and 7, as far as applicable, state the facts which make the marriage null and void.

10. A petition for the annulment of a marriage shall, in addition to the particulars mentioned in Rules 5 and 7, as far as applicable, state the ground or grounds on which annulment of the marriage is sought.

11. **Impleading of co-respondent.**—A petition for judicial separation or divorce on the grounds of adultery shall implead the alleged adulterer as a co-respondent, unless any of the following reasons is given for not so impleading—

(a) that the respondent is leading the life of a prostitute and that the petitioner knows of no person with whom the adultery has been committed ;

(b) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it ;

(c) that the alleged adulterer is dead.

12. **Intervener.**—(a) Any person, not already a party to the proceedings may, by an application supported by an affidavit, seek the permission of the Court to intervene and show cause why a decree for divorce, declaration of nullity of marriage or annulment of marriage should not be passed.

(b) If the Court allows such an application, the intervener shall be made a party to the proceedings and shall, if the intervention is not *bona fide*, be liable for costs.

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13. **Damages.**—The Court may award to the petitioner such damages against a co-respondent who has been found guilty of adultery, as the Court deems proper.

14. **Limitation.**—The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications and appeals under the Act.

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THE SPECIAL MARRIAGE (PUNJAB HIGH COURT) RULES, 1956

No. 272-Genl/XXVII-12.—In exercise of the powers conferred by Section 41 of the Special Marriage Act, 1954 (No. 43 of 1954), the Punjab High Court has made the following rules :

1. **Short title.** These rules may be called the Special Marriage (Punjab High Court) Rules, 1956.

2. **Definitions.**—In these rules, unless there is anything repugnant in the subject or context,—

(a) 'Act' means the Special Marriage Act, 1954 (No. 43 of 1954).

(b) 'Form' means a form prescribed in the Act, or appended to these rules.

(c) 'Section', 'sub-section' and 'Chapter' means, respectively, Section, sub-section and Chapter of the Act.

(d) All other terms and expressions used herein but not defined shall have the meaning assigned to them in the Act.

3. **Petition to be accompanied by certificate of marriage.**—A petition under the Act shall be accompanied by a certified copy of the certificate of marriage (unless the certificate is already on the record).

4. **Contents of the petition.**—(1) A petition under Chapter V or Chapter VI shall state —

(i) the date and place of marriage ;

(ii) the status and place of residence of the parties to the marriage before the marriage and at the time of filing the petition ;

(iii) the principal permanent addresses where the parties have cohabited, including the address where they last resided together ;

(iv) whether there have been previous proceedings with regard to marriage by or on behalf of any party ; if so, the result of those proceedings ;

(v) whether any children were born of the marriage, and, if so the date and place of birth and the name and sex of each child separately ; and whether alive or dead ;

(vi) the matrimonial offences charged set in separate paragraphs with the times and places of their alleged commission.

Presentation of petition.—(2) Every petition under Chapters V and VI shall be presented to the Court in person or through an Advocate or a pleader or a recognised agent.

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5. Notice to respondent.—(1) A notice of every petition or application under the Act shall be issued to the respondent in Form A to appear and answer the claim on a day to be therein specified :

Provided that no such notice would be necessary when the respondent appears at the time of the presentation of the petition or application.

Copies for respondent.—(2) Every such notice shall be accompanied by a copy of the petition or application. The required number of copies of the petition or application shall be supplied by the petitioner or applicant at the time of its presentation in Court.

6. Petition on ground of adultery. Adulterer to be impleaded as party.—Upon a petition presented by a husband for divorce on the ground of adultery, the petitioner shall make the alleged adulterer a co-respondent. The petitioner may, however, be excused from so doing on any of the following grounds with the permission of the Court –

(a) that the respondent is leading the life of a prostitute and that the petitioner knows of no particular person with whom the adultery has been committed ;

(b) that the name of the alleged adulterer is unknown to the petitioner although he has made due efforts to discover the same ;

(c) that the alleged adulterer is dead.

7. Full acts of adultery to be given.—In any petition for divorce the petitioner shall be required to give particulars as nearly as he can of the acts of adultery alleged to have been committed by the respondent or respondents, as the case may be.

8. True copy of pleadings to be served on adulterers.—Where a husband is charged with adultery with a named person, a true copy of the pleadings containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

9. Pleadings of respondents and intervener to be verified.—(a) A respondent or a co-respondent or a woman to whom leave to intervene has been granted under these rules, may file in the Court an answer to the petition.

(b) Any answer which contains matters other than a simple denial of the facts stated in the petition, shall be verified in respect of such matters by the respondent or co-respondent, as the case may be, in the manner required by the rules for the verification of petitions and when the respondent is husband or wife of the petitioner, the answer shall contain a declaration that there is not any collusion or connivance between the parties.

(c) Where the answer of a husband alleges adultery and prays for relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as on a petition. When in such a case no relief is claimed, the alleged adulterer shall not be made a co-respondent but a certified copy of the answer shall be served upon him together with a notice that he is entitled within the time therein specified to apply for leave to intervene in the proceedings and upon such application, he may be allowed to intervene, subject to such direction, as may then be given by the Court.

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10. Affidavit of non-cohabitation for divorce after decree of judicial separation.—A petition for divorce, after the passing of a decree for judicial separation, shall be accompanied by an affidavit made by the petitioner to the effect that he or she has not resumed co-habitation for a period of two years or upwards after the passing of a decree for judicial separation.

11. Permission of Court necessary to intervene.—Any person, not a party to the proceedings under Sections 23, 24, 25, 27 and 28 of the Act, may be permitted by the Court to intervene in those proceedings and to show that the allegations made by the petitioner in those proceedings were contrary to facts and that those proceedings were collusive. Such permission shall not be granted, unless the person seeking to intervene puts in an affidavit in support of his allegations, and the Court holds that it is proper to give such a permission. Every party or person intervening in the case, when he first appears in Court, shall file a proceeding stating his or her address for service.

12. Dismissal in default and restoration of petition.—(a) If any petition has been dismissed in default for non-appearance or for non-prosecution of the same the Court may restore the same on a petition, presented within 60 days from the date of the order of dismissal, if sufficient cause is shown for the restoration. But in all cases, where the petition has been dismissed in the presence of the respondent the same shall not be restored, unless a notice is issued to the respondent.

When can ex parte orders be set aside.—(b) When *ex parte* proceedings have been taken in a case under Chapters V, VI and VII of the Act, the same may be set aside on sufficient cause being shown. The petition for setting aside the *ex parte* proceedings shall be made within 60 days from the date of service and where no service has been effected from the date of knowledge. Section 5 and 12 of the Indian Limitation Act shall apply to proceedings for restoration or setting aside *ex parte* decree and for purposes of appeal.

13. Claim for damages and mode of its assessment.—In cases where damages are claimed from the adulterer co-respondent, the ground on which such damages are founded shall be fully and clearly stated in the petition for divorce as also the mode of its assessment.

The petitioner shall specify the amount claimed as damages from the adulterer co-respondent, and if the adultery is proved, such damages as the Court may deem proper be assessed and paid to the petitioner, although the respondents or either of them may not appear.

14. Payment by co-respondent of the costs of petition.—Whenever in any petition presented by a husband the alleged adulterer has been made a correspondent and adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings, provided that the co-respondent shall not be ordered to pay the petitioner's costs :

(i) if the respondent was at the time of adultery living apart from her husband and was leading a life of a prostitute, or

(ii) if the co-respondent had not, at the time of adultery, reason to believe the respondent to be a married woman.

15. Register to be maintained.—Every court shall maintain a register in which the details regarding petitions shall be entered and it shall conform to Civil Register No. 3 maintained for Divorce and Matrimonial cases.

16. Forms.—The forms given in the Appendix to these rules may, with necessary modifications, be used in the proceedings under the Act.

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SPECIAL MARRIAGE RULES, 1955

RAJASTHAN HIGH COURT RULES, 1952

Chapter XXXIV-A

818-A. Short title and commencement.—(i) These Rules may be called the Special Marriage Rules, 1955.

(ii) The Rules shall come into force from the date of publication.

818-B. Definition.—(i) "Act" means the Special Marriage Act, 1954 (XLIII of 1954).

(ii) "Code" means the Code of Civil Procedure, 1908.

(iii) "Court" means District Court.

818-C. Petition.—Every petition made under the Act, shall be accompanied by a certified copy of the certificate from the Marriage Certificate Book about the solemnization of the marriage under the Act.

818-D. Contents of petitions.—(i) In addition to the particulars required to be given under Order VII, Rule 1 of the Civil Procedure Code every petition for judicial separation, nullity of marriage and divorce shall contain the following particulars :

(a) The place and date of marriage.

(b) The name, status and domicile of the wife and husband before the marriage.

(c) The principal permanent address where the parties cohabited including the address where they last resided together.

(d) Whether there is living any issue of the marriage and if so, the names and dates of birth, or ages of such issues.

(e) Whether there have been in any court in India, and if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties and the result of such proceedings.

(f) The matrimonial offence charged set out in separate paragraphs with the time and places of their alleged commission.

(g) The claims for damages, if any, with particulars.

(h) If the petition is one for a decree of dissolution of marriage, or of nullity or annulment of marriage or for judicial separation, it shall further state that there is no collusion or connivance between the petitioner and the other parties to the marriage or alleged marriage.

(i) The relief or reliefs prayed for.

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(ii) In every petition presented by a husband for divorce or judicial separation, on the ground that the wife has committed adultery with any person or persons the petitioner shall state the name, occupation and place of residence of such person or persons so far as they can be ascertained.

(iii) In every petition presented by a wife for divorce or judicial separation, on the ground that her husband has committed adultery with any woman or women, the petitioner shall state the name, occupation and place of residence of such woman or women, so far as they can be ascertained.

818-E. Co-respondent in husband's petition.—In any petition presented by a husband for divorce or judicial separation on the ground that his wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing by an order of the Court which may be made on any one or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts :

(i) That the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed.

(ii) That the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for discovery.

(iii) That the alleged adulterer is dead.

(iv) For any other sufficient reason that the Court may deem fit to consider.

818-F. Verification of petition.—Statements contained in every petition shall be verified by the petitioner or some other competent person in a manner required by the Code of Civil Procedure for the time being in force for the verification of plaints.

818-G. Forms of petitions.—The petitions made under the Act shall, so far as possible, be made in the forms prescribed in the Schedule to the Indian Divorce Act, 1869 (IV of 1869).

818-H. Petitions on behalf of lunatics.—When a husband or a wife is a lunatic or an idiot, any petition under the Act, other than the petition for restitution of conjugal rights, may be brought on his or her behalf, by the person entitled to his or her custody.

818-I. Petitions by minors.—(1) Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court ; and no petition presented by a minor under the Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

(2) The next friend shall file an affidavit along with the petition which shall state the age of the minor, that the next friend has no adverse interest to that of the minor and that the next friend is otherwise a fit and proper person to act as such.

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(3) The Court may on considering the affidavit and such other material as it may require, record its approval to the representation of the minor by the next friend or pass such other orders as it may deem fit.

818-J. Notice.—The Court shall issue notice to the respondent and co-respondent, if any. The notice shall also require, unless the Court otherwise directs, the respondent or co-respondent to file his or her statement in Court within a period of four weeks from the service of the notice and to serve a copy thereof upon each of the other parties to the petition, within the aforesaid period.

818-K. Service of petitions.—Every petition and notice under the Act shall be served on the party affected thereby in a manner provided for service of summons under Order V of the Civil Procedure Code :

Provided that the Court may dispense with such service altogether in case it seems necessary or expedient so to do.

818-L. Written statements in answer to petitions by respondents.—The respondent may and, if so, required by the Court shall present a written statement in answer to the petition. The provisions of Order VIII of the Code shall apply *mutatis mutandis* to such written statements. In particular, if in any proceedings for divorce the respondent opposes the relief sought in the petition on the ground of the petitioner's adultery, cruelty, or desertion, the written statement shall state the particulars of such adultery, cruelty or desertion as required in the case of petition under clauses (d), (e) and (f) of sub-rule (i), Rule 818-D and sub-rules (ii) and (iii) of the same rule and the particulars of any relief which he claims on the said grounds.

818-M. Interveners in wife's petition.—(1) Unless the Court for good cause shown otherwise directs :

(a) Where the husband is charged with adultery a named female person a certified copy of pleading or material portion thereof containing such charge shall be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the cause.

(b) Where the written statement of the respondent alleges adultery by the petitioner with a named man or woman, as the case may be, a certified copy of such statement or such material portion thereof containing such allegation shall be served such man or woman, accompanied by a notice that such person is entitled within the time therein specified to apply for leave to intervene in the cause.

(2) (a) **Costs regarding intervention.**—Whenever the Court finds that an intervener has no sufficient grounds for intervening, it may order the intervener to pay the whole or any part of the costs occasioned by the application to intervene.

(b) Whenever the Court finds that the charge or allegation of adultery against the intervener made in any petition or written statement is baseless or not proved and that the intervention is justified, it may order the person making such charge or allegation against the intervener to pay to the intervener the whole, or any part of the costs of intervention.

818-N. Answer.—A person to whom leave to intervene has been granted may file in the court an answer to the petition or written statement containing the charges or allegations against such intervener.

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818-O. Intervention by third party.—During the progress of the petition under Chapter V or VI of the Act, any person suspecting that any parties to the petition are or have been acting in collusion, or the petitioner has committed fraud or he has concealed some material facts from the Court for the purpose of obtaining the decree prayed for, shall be at liberty to apply to the court stating the circumstances and facts of such collusion, fraud and concealment as the case may be. The application shall be supported by an affidavit. When such application is filed, the court shall give notice thereof to the parties concerned and after hearing them and taking necessary evidence pass the necessary orders :

(i) If the court comes to the conclusion that such collusion, fraud or concealment of material fact is proved, then the original petition shall be dismissed and the intervening third party shall be awarded his costs from the perties, guilty of such collusion, fraud or concealment of facts.

(ii) Whenever such application is made and the court comes to the conclusion that the intervening third party had no grounds or no sufficient grounds for intervening, it may order him to pay the whole or any part of the costs occasioned by his intervention.

818-P. Competency of husband and wife to give evidence as to cruelty or desertion or judicial separation.—On any petition presented by a wife, praying for divorce or judicial separation by reason of her hushand having been guilty of adultery coupled with cruelty or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

818-Q. Mode of taking evidence.—The witnesses in all proceedings before the court, where their attendance can be had, shall be examined orally, and any party may offer himself, or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness :

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit but so that the deponent in every such affidavit shall, on the petition of the opposite party, or by direction of the court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination the party by whom such affidavit was filed.

818-R. Damages.—Any husband may, either in a petition for divorce or judicial separation, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner ;

(i) Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service in accordance with the provision of Rule 818-K.

(ii) The damages to be recovered on any such petition shall be ascertained by the said court, although the respondent or either of them may not appear. After the decision has been given, the court may direct in what manner the damages shall be paid or applied.

818-S. Costs.— Whenever in any petition presented by a husband, the alleged adulterer has been made a co-respondent and the adultery has been

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established, the court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs :

(i) If the respondent was, at the time of the adultery living apart from her husband and leading the life of a prostitute ; or

(ii) If the co-respondent had not, at the time of adultery, reason to believe the respondent to be a married woman.

818-T. Taxation of costs.—Unless otherwise directed by the court, the costs of the petition under the Act shall be costs as taxed in suits under the Indian Divorce Act, IV of 1869.

818-U. Order as to costs.—The award of costs shall be within discretion of the court and the court shall make an order about the same while passing the decree.

818-V. Power to adjourn.—The court may from time to time adjourn the hearing of any petition under the Act, and may require further evidence thereon if it seems fit so to do.

818-W. Transmission of certified copy of the decree.—The Court shall send a certified copy of every decree for divorce or nullity or dissolution of marriage to the Marriage Officer appointed under Section 3 of the Act.

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APPENDIX III

RELEVANT EXTRACT FROM C. P. C., 1908

ORDER XXXII-A[1]

SUITS RELATING TO MATTERS CONCERNING THE FAMILY

1. Application of the Order.—(1) The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.

(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely :—

(a) a suit or proceeding for matrimonial relief, including a suit or proceeding for declaration as to the validity of a marriage or as to the matrimonial status of any person ;

(b) a suit or proceeding for a declaration as to the legitimacy of any person ;

(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability ;

(d) a suit or proceeding for maintenance ;

(e) a suit or proceeding as to the validity or effect of an adoption ;

(f) a suit or proceeding, instituted by a member of the family, relating to wills, intestacy and succession ;

(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

2. Proceedings to be held in camera.—In every suit or proceeding to which this Order applies, the proceedings may be held in camera if the Court so desires and shall be so held if either party so desires.

3. Duty of Court to make efforts for settlement.—(1) In every suit or proceeding to which this Order applies, an endeavour shall be made by the Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject-matter of the suit.

(2) If, in any such suit or proceeding, at any stage it appears to the Court that there is a reasonable possibility of a settlement between the parties, the Court may adjourn the proceeding for such period as it thinks fit to enable attempts to be made to effect such a settlement.

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1. Ins. by C.P.C. (Amendment) Act, 1976, Section 80 (w.e.f. 1-2-1977).

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(3) The power conferred by sub-rule (2) shall be in addition to, and not in derogation of, any other power of the Court to adjourn the proceedings.

4. Assistance of welfare expert.—In every suit or proceeding to which this Order applies, it shall be open to the Court to secure the services of such person (preferably a woman where available), whether related to the parties or not, including a person professionally engaged in promoting the welfare of the family as the Court may think fit, for the purpose of assisting the Court in discharging the functions imposed by Rule 3 of this Order.

5. Duty to inquire into facts.—In every suit or proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant.

6. "Family"—meaning of.—For the purposes of this Order, each of the following shall be treated as constituting a family, namely—

(a) (i) a man and his wife living together,

(ii) any child or children, being issue of theirs ; or of such man or such wife,

(iii) any child or children being maintained by such man and wife;

(b) a man not having a wife or not living together with his wife, any child or children, being issue of his, and any child or children being maintained by him ;

(c) a woman not having a husband or not living together with her husband, any child or children being issue of hers, and any child or children being maintained by her ;

(d) a man or woman and his or her brother, sister, ancestor or lineal descendant living with him or her ; and

(e) any combination of one or more of the groups specified in clause (a), clause (b), clause (c), or clause (d) of this rule.

Explanation.—For the avoidance of doubts, it is hereby declared that the provisions of Rule 6 shall be without any prejudice to the concept of "family" in any personal law or in any other law for the time being in force.

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APPENDIX IV

THE BOMBAY REGISTRATION OF MARRIAGES ACT, 1953

(Bombay Act No. V of 1954)

An Act to provide for registration of marriages in the State of Maharashtra

Whereas it is expedient to provide for registration of marriages in the State of Maharashtra and for certain other purposes hereinafter appearing;

It is hereby enacted as follows :

1. Short title, extent and commencement.—(1) This Act may be called the Bombay Registration of Marriages Act, 1953.

(2) It extends to the whole of the State of Maharashtra.

(3) This section shall come into force at once. Section 5-B will come into force on date of commencement of Bombay Registration of Marriages (Amendment) Act, 1977 (Mah. Act XXIV of 1977). The remaining provisions of the Act shall come into force in such area on such date as the State Government may, by notification in the Official Gazette, appoint.

2. Definitions. – In this Act, unless there is anything repugnant in the subject or context, --

(1) "to contract a marriage" means to solemnize or enter into a marriage in any form or manner ;

(2) "marriage" includes re-marriage ;

(3) "memorandum" means a memorandum of marriage mentioned in Section 5 ;

(4) "priest" means any person who solemnizes a marriage ;

(5) "register" means a register of marriages maintained under this Act ;

(6) "Registrar" means a Registrar of Marriages appointed under this Act ;

(7) "Registrar-General" means the Registrar-General of Births, Deaths and Marriages appointed by the State Government for the State of Maharashtra under the Births, Deaths and Marriages Registration Act, 1886 (VI of 1886) ;

(8) "Schedule" means the Schedule to this Act.

3. Appointment of Registrars of Marriages.—The State Government may appoint, either by name or by virtue of their office, so many persons as it thinks necessary to be Registrars of Marriages for such local areas as it may specify.

4. Every marriage in State to be registered.—After the date on which the provisions of this Act have been brought into force in any area under sub-section (3) of Section 1, every marriage contracted in such area shall be registered in the manner provided in Section 5.

5. Memorandum of marriage.—(1) The parties to a marriage to which Section 4 applies, or their fathers or guardians when they shall not have

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completed the age of 18 years, shall prepare and sign a memorandum in the form in the Schedule and shall deliver or send by registered post the said memorandum in duplicate to the Registrar of the area, within a period of 30 days from the date of the marriage :

Provided that where the marriage is contracted without the consent of the father or guardian of a party, such party and not the father or guardian shall comply with the provisions of sub-section.

(2) The memorandum shall also be signed by the officiating priest, if any.

(3) The memorandum shall be accompanied by a fee of rupee one.

(4) The Registrar shall maintain a register of such marriages. On receipt of the memorandum the Registrar shall file the same in the register and shall send the duplicate copy thereof to the Registrar-General.

[1][5-A. **Memorandum of marriage submitted after 30 days.** (1) A memorandum regarding any particular marriage may be submitted to the Registrar after the expiry of the period of 30 days specified under sub-section (1) of Section 5. Such memorandum shall be in the form, and shall be signed, as provided for in Section 5 and shall be accompanied by such fee not exceeding rupees ten as may be prescribed. On receipt of such memorandum the Registrar shall file the same in the register and shall also send the duplicate copy thereof to the Registrar-General as provided in Section 5.

(2) Nothing in sub-section (1) shall affect the liability of any person who has wilfully omitted or neglected to deliver or send the memorandum within the period specified in sub-section (1) of Section 5 to any penalty under Section 8.]

[2][5-B. **Voluntary registration of marriages contracted in areas in which remaining provisions have not been brought into force.**—(1) In any area in the State of Maharashtra in which the remaining provisions of this Act have not been brought into force by a notification under sub-section (3) of Section 1, the parties to any marriage contracted in that area, or their fathers or guardians when they shall not have completed the age of 18 years, may if they so desired, prepare and sign a memorandum in the form in the Schedule and deliver or send by registered post the said memorandum in duplicate to such Registrar as the State Government may, from time time, by notification in the Official Gazette, specify in this behalf. The memorandum may also be signed by the officiating priest, if any. The memorandum shall be accompanied by a fee of rupee one of it is sent or delivered within a period of 30 days from the date of the marriage and a fee not exceeding rupees ten as may be prescribed if it is sent or delivered after the expiry of the aforesaid period of 30 days.

(2) On receipt of any such memorandum, the Registrar shall file the same in the register of marriages maintained by him and shall send the duplicate copy thereof to the Registrar-General as provided in Section 5, and other provisions of this Act shall also apply to such memorandum as they apply to any memorandum submitted to the Registrar under Section 5 in any area in which that section has been brought into force, subject to the following modifications, namely, –

(a) In Section 8, in Clause (2), for the words "in such memorandum" the words, figures and letter in any memorandum "submitted under Section 5 or 5-B" shall be deemed to be substituted.

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1. This section was inserted by Bom. 36 of 1955, Section 2.
2. Section 5-B was inserted by Mah. 24 of 1977, Section 3.

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(b) In section 9, for the words and figures "pursuant to Section 5" the words, figures and letter "pursuant to Section 5 or 5B" shall be deemed to be substituted.]

6. Register to be open for public inspection.—The register maintained under this Act shall, at all reasonable times, be open to inspection and certified extracts therefrom shall on application be given by the Registrar on payment by the applicant of a fee of rupees two for each such extract.

7. Non-registration not to invalidate marriage.—No marriage contracted in this State of Maharashtra and to which this Act applies shall be deemed to be invalid solely by reason of the fact that it was not registered under this Act or that the memorandum was not delivered or sent to the Registrar or that such memorandum was defective, irregular or incorrect.

8. Penalty for neglecting to comply with provisions of Section 5 or for making false statements in memorandum.—Any person who—

(1) wilfully omits or neglects to deliver or send the memorandum as required by Section 5, or

(2) makes any statement in such memorandum which is false in any material particular, and which he knows or has reason to believe to be false,

shall, on conviction, be punished with fine which may extend to two hundred rupees.

9. Penalty for failing to file memorandum.—Any Registrar who fails to file the memorandum pursuant to Section 5 shall, on conviction, be punished with rigorous imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.

10. Penalty for secreting, destroying or altering register.—Any person secreting, destroying, or dishonestly or fraudulently altering the register or any part thereof shall, on conviction, be punished with imprisonment for a term which may extend to two years, and shall also be liable to fine.

11. Registrar to be public servant.—Every Registrar shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (XLV of 1860).

12. Indemnity to persons acting under this Act.—No suit, prosecution or other legal proceeding shall be instituted against any person for anything which is in good faith done or intended to be done under this Act.

13. Power to make rules.—(1) The State Government may, by notification in the Official Gazette and subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :

(a) the duties and powers of the Registrar ;

(b) the forms and manner in which registers or records required to be kept by or under this Act shall be maintained ;

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(c) the custody in which the registers and records are to be kept and the preservation of such registers and records ;

(d) the fee to be paid under Section 5-A.

14. Savings.—This Act shall not apply to marriages contracted under the Special Marriage Act, 1954 (XLIII of 1954), the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1936 (III of 1936).

THE SCHEDULE

FORM

(*See* Section 5)

MEMORANDUM OF MARRIAGE

1. Date of marriage.
2. Place of marriage (with sufficient particulars to locate the place).
3. (a) Full name of the bridegroom.
   (b) His age.
   (c) Usual place ef residence.
   (d) Address.
   (e) Status of the bridegroom at the time of marriage whether
   unmarried
   widower
   divorced
   married, and if so, how many wives are alive.
   (f) Signature of the bridegroom, with date.
4. (a) Full name of the bride.
   (b) Her age.
   (c) Usual place of residence.
   (d) Address.
   (e) Status of the bride at the time of marriage whether
   unmarried
   widower
   divorced
   (f) Signature of the bride, with date.
5. (a) Full name of the father or guardian of the bridegroom.
   (b) His age.
   (c) Usual place of residence,

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(d) Address.

(e) Signature of the father or guardian of the bridegroom with date.

6. (a) Full name of the father or guardian of the bride.

(b) His age.

(c) Usual place of residence.

(d) Address.

(e) Signature of the father or guardian of the bride, with date.

7. (a) Full name of the officiating priest.

(b) His age.

(c) Usual place of residence.

(d) Address.

(e) Signature of the officiating priest, with date.

NOTIFICATIONS UNDER BOMBAY ACT V OF 1954

G. N., L. S. G. & P. H. D., No. RGM-1153 (a), dated 20th December 1954 (B. G, Pt. IV-B, p. 1706).

In exercise of the powers conferred by sub-section (3) of Section 1 of the Bombay Registration of Marriages Act, 1953 (Bom. V of 1954), the Government of Bombay is pleased to appoint the 15th January, 1955 as the date on which and the areas specified in the Schedule hereto annexed as the areas in which Sections 2 to 14 of the said Act including the Schedule thereto shall come into force.

Schedule

Areas within the limits of—

(i) Greater Bombay ;

(ii) the Cities of Ahmedabad and Poona as constituted under the Bombay Provincial Municipal Corporations Act, 1949 (Bom. LIX of 1949) ;

(iii) all the municipal boroughs as defined in the Bombay Municipal Boroughs Act, 1925 (Bom. XVIII of 1925) ;

(iv) all the municipal districts as defined in the Bombay District Municipal Act, 1901 (Bom. III of 1901) ;

(v) all the cantonments in the State of Bombay declared as such, under sub-section (1) of Section 3 of the Cantonments Act, 1924 (II of 1924) ;

(vi) areas of gaothans of villages which are headquarters of taluqas or mahals, not being areas falling under Clauses (i) to (v) above.

G. N., U. D. & P. H. D., No. RGM-1164 (a)-C, dated 12th March 1964 (M. G., Pt. IV-B, p. 286).

In exercise of the powers conferred by sub-section (3) of Section 1 of the Bombay Registration of Marriages Act, 1953 (Bom. V of 1954), the Government of Maharashtra hereby appoints the Ist day of April, 1964 to be the date

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on which and the areas specified in the Table hereto annexed as the additional areas in which Section 2 to 14 (both inclusive) of the said Act, including the Schedule thereto shall come into force.

TABLE

Areas within the limits of—

(i) the Corporation of the City of Nagpur as constituted under the City of Nagpur Corporation Act, 1948 (C. P. & Berar II of 1950);

(ii) all cantonments declared as such under the Cantonments Act, 1924 (II of 1924), in the Vidarbha region and Hyderabad areas of the State;

(iii) all municipal committees constituted under the Central Provinces and Berar Municipalities Act, 1922 (C. P. & Berar II of 1922);

(iv) all municipal committees or town committees constituted under the Hyderabad District Municipalities Act, 1956 (Hyd. XVIII of 1956);

(v) the areas of gaothans of villages in the Vidarbha region and Hyderabad area of the State, which are headquarters of tahsils or mahals, not falling under Clauses (i) to (iv) above.

G. N., L. S. G. & P. H. D., No. RGM-1153 (*b*), *dated 20th December*, 1954 (*B. G., Pt. IV-B. p.* 1706).

In exercise of the powers conferred by Section 3 of the Bombay Registration of Marriages Act, 1953 (Bom. V of 1954), the Government of Bombay is pleased to appoint all the Sub-Registrars and the Joint Sub-Registrars appointed under the Indian Registration Act, 1908 (XVI of 1908), to be Registrars of Marriages for the local areas falling within their respective jurisdiction, in which the provisions of the first mentioned Act have come into force.

G. N., U. D. & P. H. D., No. RGM-1164-(*b*)-*C*, *dated 12th March*, 1964 (*M. G., Pt. IV-B, p.* 287)

In exercise of the powers conferred by Section 3 of the Bombay Registration of Marriages Act, 1953 (Bom. V of 1954), the Government of Maharashtra hereby appoints all the Sub-Registrars and the Joint Sub-Registrars appointed under the Indian Registration Act, 1908 (XVI of 1908), in the Vidarbha region and Hyderabad area of the State also to be the Registrars of Marriages for the local areas falling within their respective jurisdiction, in which the provisions of the first mentioned Act have come into force.

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APPENDIX V

REGISTRATION OF MARRIAGE RULES

1. ANDHRA PRADESH

THE ANDHRA PRADESH HINDU MARRIAGE REGISTRATION RULES, 1965[1]

In exercise of the powers conferred by Section 8 of the Hindu Marriage Act, 1955 (Central Act 25 of 1955) the Governor of Andhra Pradesh hereby makes the following rules, the same having been previously published for general information.

1. These rules may be called the Andhra Pradesh Hindu Marriage Registration Rules, 1965.

2. In these rules, unless the context otherwise requires : –

(a) "Act" means the Hindu Marriage Act, 1955 (Central Act 25 of 1955 ;

(b) "Compulsory registration area" means the area in which registration of marriages is directed by the Government to be compulsory under sub-section (2) of Section 8 ;

(c) 'Form" means a form appended to these rules ;

(d) "Government" means the Government of Andhra Pradesh ;

(e) "Hindu Marriage" means a marriage including re-marriage solemnized in accordance with the provisions of the Act ;

(f) 'Hindu Marriage Register" means a Hindu Marriage Register kept in From 'B' ;

(g) "Inspecting Officer" means any Officer authorised by the Registrar General to inspect the Marriage records ;

(h) "Registrar General" means the Registrar General of Births, Deaths and Marriages appointed by the Government under Section 6 (1) (b) of the Births, Deaths, and Marriages Registration Act, 1886 (Central Act 6 of 1886) or Section 2 (1) (b) of the Andhra Pradesh (T. A.) Registrar General of Births, Deaths and Marriages Act, 1953 (Act VIII of 1953) ;

(i) "Registrar" means a Registrar appointed for registering Hindu Marriages under the Act.

(j) "Section" means a section of the Act.

3. (1) The Government may, by notification published in the Andhra Pradesh Gazette appoint as many persons as may be necessary as Registrars for the purpose of registering the Hindu Marriages under the Act, with jurisdiction over such area as may be specified in the notification.

(2) Every Registrar shall reside within the local limits of his jurisdiction and shall cause his name, designation and the working hours of his office to be written in English, Telugu and in the regional language of the area and displayed in a conspicuous part on the outer side of the building in which the office is located.

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1. G. O. Ms. No. 654, Home (General A), dated 22nd March, 1965. Published in Rule supplement in Part II of the A. P. Gazette No. 13, dated 22nd April, 1965.

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4. (1) A Hindu Marriage which has been solemnized may be registered by the Registrar in the Hindu Marriage Register which shall be maintained by him in Form 'B'.

(2) The Hindu Marriage Register shall be a bound volume of one hundred leaves the pages having been machine numbered consecutively.

5. (1) An application for the registration of a Hindu Marriage shall be in Form 'A' and shall be signed by each party to the marriage or by the guardian of such party and shall be presented in person before the registrar in whose jurisdiction the marriage is solemnized or before the Registrar in whose jurisdiction either party to the marriage has been residing for at least six months immediately preceding the date of marriage :

Provided that an application for the registration of marriage solemnised beyond the territories of India excluding the State of Jammu and Kashmir may be presented within one month from the date on which the parties arrive in the State of Andhra Pradesh before any Registrar in the said State of Andhra Pradesh.

(2) It shall be attested by any one of the following persons if any applicant is illiterate :

(i) a Village Munsif ;

(ii) Magistrate of any Class including an Honorary Magistrare ;

(iii) a Government servant whose emoluments are not less than Rs. 50 per month ;

(iv) a Government pensioner whose pension is not less than Rs. 25 per month ;

(v) a member of a Zilla Parishad, a Panchayat Samithi, or a Gram Panchayat ;

(vi) a member of a Municipal Council or a Municipal Committee ;

(vii) any person authorised to solemnize a marriage under the Special Marriage Act, 1954 (Central Act 43 of 1954) ;

(viii) A Medical Officer in a Government, Local Fund or Municipal employment or a private medical practitioner holding a University diploma or degree recognised by the Government ;

(ix) a member of the Parliament or of the Andhra Pradesh State Legislature.

(3) It shall be presented within one month from the date of solemnisation of the marriage ;

Provided that if it is not so presented within the prescribed period, the Registrar may, if satisfied with the reasons adduced for the failure to present it within the prescribed period, condone the delay not exceeding one month :

Provided further that the Registrar General may condone the delay beyond the period of one month.

6. (1) On receipt of the application in Form 'A' the Registrar shall, unless both the parties to the marriage and the guardians if any, appear before

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him personally and are identified to his satisfaction give notice of the application to the other party or parties and make such enquiries of summary character as he thinks fit regarding the marriage.

(2) Evidence if any required by the Registrar shall be taken by him on oath :

Provided that the examination of Pardanashin ladies who do not appear before the Registrar may be conducted through a Hummamnce or Mama.

(3) On being satisfied about the marriage the Registrar shall enter the particulars of the marriage in his own hand in the Hindu Marriage Register. Every entry relating to such particulars shall be signed by both the parties to the marriage :

Provided that the Registrar may in his discretion require that one or more witnesses shall also sign in the Hindu Marriage Register.

7. (1) When the Registrar is not satisfied about the indentity of the parties or about the fact of the marriages, he shall by an order in writing refuse to register a marriage and shall record the reasons for his decision.

(2) An appeal against such order of the Registrar shall lie to the Registrar General who may pass suitable orders after giving an opportunity to both the parties and his order shall be final.

8. (1) Every erasure or interlineation occurred in making entries in the Hindu Marrriage Register shall be attested by the Registrar, and a note of the number of erasures and interlineations in the entries shall be made at the foot of the page containing the entries by the Registrar in his own hand and attested with his initials. He shall then authenticate the entries with his signature and date.

(2) No corrections or alterations in material particulars like name, age, date or place, shall be made in the Hindu Marriage Register without obtaining the sanction of the Registrar General.

(3) Every correction made after obtaining the required sanction under sub-rule (2) shall be made by the Registrar by a note in the foot note, without any alteration of the original entry, and shall be signed and dated by him.

9. All applications for registration of Hindu Marriages and for copies of certified extracts from the Hindu Marriage Register shall be serially numbered separately for each calendar year, and preserved as a permanent record.

10. Every Registrar shall cause to be maintained indices in Form ' ' of all entries made in the Hindu Marriage Register. Every entry in an index shall be made alphabetically with reference to the surname of the party wherever it is given and in other cases with reference to the name of the party.

11. The Hindu Marriage Register shall at all reasonable times be open for inspection in the presence of the Registrar by any person applying to inspect it.

12. The Registrar General may authorise any officer to be an Inspecting Officer for the purpose of inspecting the Hindu Marriage Register and other marriage records.

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13. The Inspecting Officer shall inspect the marriage records of Hindu Marriages and submit an inspection report in duplicate to the Registrar General.

14. The Registrar General shall scrutinise the report and forward a copy thereof to the Registrar with his further remarks, if any added on them through the Inspecting Officer concerned.

15. (1) Every application for grant of copies of records or for an extract from the Hindu Marriage Register may be made either in person or by post addressed to the Registrar, with the court fee stamp duly affixed and accompanied by such number of stamps as are necessary to prepare the required copy and in the case of a request for grant of extract from the Hindu Marriage Register a sum of Rs. 5 being the fee.

(2) Certified extracts from the Hindu Marriage Register and certified copies of other records shall be granted under the official seal of the Registrar on payment of the fees.

[(3) In addition to the fees prescribed in sub-rule (1) the following fee shall be levied, by the Marriage Registrar.—

Schedule Fees.—

	Rs. Ps.
(i) For the registration (to be paid by the parties to the Marriage) which will be exclusive of any other fees levied by Temple authorities for marriages in Temples.	5.00
(ii) For making a search in any record relating to (to be paid by the applicant) ;	
(a) the current year	1.00
(b) any other year or years	1.00 for each such year.
(iii) For certified copy of any record (other than the certified copy of an extract from Hindu Marriage Registrar) (to be paid by the applicant).	2.00
(iv) For registering a marriage at any place outside the office of the Marriage Registrar (to be appropriated by the Marriage Registrar) (Under Rule 21)	10.00

Note.—The application for a search and a certified copy should be affixed with necessary court fee labels. No search fee shall be levied for granting a certified extract from the Hindu Marriage Register on application at the time of registration of the marriage].

16. All fees realised shall at once be brought on account in 'Form-D' and shall be remitted into the Government Treasury under the head of account "Miscellaneous, Social and Developmental Organisations (d) Miscellaneous (iii) Births, Deaths and Marriages Registration Fees.

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17. A receipt in "Form E" shall be granted for the fee paid in person under Rule 15.

18. (1) The following records shall be maintained by the Registrar :—

(a) Applications made for registration of Hindu Marriage or for correction thereof together with concerned records.

(b) Hindu Marriage Register.

(c) File of application for certified extracts.

(d) Register of fees.

(e) Chalans for the money remitted into the treasury.

(f) Fee Receipt Book.

(g) General correspondence.

(h) File of G. Os. and Circulars.

(i) Indices.

(2) The records referred to in clauses (a), (b), (c), (d), (e), (f), (h) and (i) of sub-rule (1) shall be preserved permanently.

19. The Registrar General may specify any other records to be maintained by the Registrar and determine the period of preservation of such records.

20. (1) Any Registrar, who discovers any error in the form or substance of any entry in the Hindu Marriages Register may, within one month next after the discovery of such error in the presence of the persons married and in case of their death or absence, in the presence of two other credible witnesses and subject to the provisions contained in Rule 8 direct the correction of the error :

Provided that, where any correction was made in the absence of the persons married, the nature of such correction shall be intimated to them by registered post with acknowledgement due at their last known address.

(2) Every correction made under this rule shall be attested by the parties or the witnesses, as the case may be, in whose presence it is made.

21. For the registration of a marriage, the Registrar may, upon being provided with a conveyance, attend any place outside his office provided there is an application in writing in this behalf and signed by either of the parties to the marriage and the additional fees prescribed therefor in Rule 15 is paid and the hour is not unreasonable.

APPENDIX

To,

The Registrar,

.....district

Date of receipt.....

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FORM A

[*See* Rule 5 (1)]

Application for Registration of Hindu Marriage

Sir,

We request you to register the particulars relating to our marriage solemnized on.....at.....village/town.....taluka.....

Full names of parties	Age at solemnization of the marriage	Rank or profession	Permanent place of residence before solemnization of marriage	Date of birth	Place with names of taluk and district at which marriage was solemnized	Date of solemnization of marriage.
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Name in full of				Information to be furnished in case of divorced persons who may marry again (See Section 15)		
Father	Mother	Guardian if any of the wife with relationship (See Sec. 6)	Address of the guardian	Date of the decree in the court of the first instance	Whether the period of one year has elapsed from the date noted in column (12) to the date of the application (See proviso to Sec. 15)	Remarks
(8)	(9)	(10)	(11)	(12)	(13)	(14)

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We hereby declare that the particulars mentioned above are correct to the best of our knowledge and belief, that our marriage is one to which the Hindu Marriage Act, 1955 (Central Act 25 of 1955), applies and that we have fulfilled the conditions, laid in Section 5, 6 or 15 wherever necessary.

If the wife is a minor, signature of the guardian in marriage at the time of marriage

Station.....
Date.....

Signature with date Husband.....
Wife.....

Witnesses

Name :
Address :
Signature :

Name :
Address :
Signature :

Signature of the Registrar with date.

(For Official use only).

(No. of the application of year)

1. Date and hour of presentation :
2. Date of Registration
3. Page and volume of the Register at which the particulars of marriage have been registered

Signature of the Registrar.

FORM B

THE HINDU MARRIAGE REGISTER

[*See* Rule 4(1)]

Sl. No.	Full names of parties	Age at the time of solemnization of the marriage	Rank or profession	Permanent place of residence before solemnization of marriage	Date of birth	Place with names of Tq. & Dt. at which marriage was solemnized	Date of solemnization of marriage
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)

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Name in full of				Information to be furnished in case of Divorced persons who may marry again (See Sec. 15)		
Father	Mother	Guardian if any of the wife with relationship (See Sec. 6)	Address of the guardian	Date of the decree in the court of the first instance	Whether the period of one year has elapsed from the date noted in Col. (13) to the date of the application (see proviso to Sec. 15)	Remarks
(9)	(10)	(11)	(12)	(13)	(14)	(15)

We hereby declare that the particulars mentioned above are correct to the best of our knowledge and belief, that our marriage is one to which the Hindu Marriage Act, 1955 (Central Act 25 of 1955), applies and that we have fulfilled the conditions laid in Section 5, 6 or 15 wherever necessary.

Signature of three witnesses with addresses { 1. 2. 3.

Signature of { Husband : Wife :

The marriage between the above parties has this .....day of.....19, been registered under the Hindu Marriage Act, 1955 (Central Act 25 of 1955) as No.....of 19

If the wife is a minor signature of the legal guardian in marriage at the time of marriage

Station :
Date :

Signature of the Registrar

INDEX REGISTER

FORM C

(*See* Rule 10)

Office of the Registrar.....

Name of the husband or wife	Date of solemnization of marriage	Place at which solemnized	Reference to entry in the Hindu Marriage Register	Initials of the Registrar
(1)	(2)	(3)	(4)	(5)

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FORM D

FEES REGISTER

(*See* Rule 16)

Date	Particulars	Amount	Remarks
(1)	(2)	(3)	(4)

FORM E

Receipt in Duplicate

(See Rule 17)

1. Serial No.
2. Date of receipt.
3. From whom received.
4. On what account received.
5. Provisions of the Act or the rules under which chargeable.
6. Amount of fees.

Signature of Registrar.

———

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2. ASSAM

THE HINDU MARRIAGE (ASSAM) RULES, 1961

1. These rules may be called the Hindu Marriage (Assam) Rules, 1961 and they shall come into force at once.

2. In these rules, unless the context otherwise requires :—

(a) the 'Act' means the Hindu Marriage Act, 1955 (Central Act 25 of 1955) ;

(b) 'Section' means the section of the Act ;

(c) 'Registrar General of Births, Deaths and Marriages' appointed under Act VI of 1886, shall be Registrar General for the purposes of this Act ;

(d) 'District Registrars' and 'Sub-Registrars' appointed under Act XVI of 1908, shall be 'Marriage Officer' for the purposes of this Act ;

(e) 'Form' means a form appended under the Schedule to these rules.

3. Every Registrar or Marriage Officer shall cause his name, designation and the working hours of his office to be written in English and in the language or languages of the district, place or area in which he functions as such and displayed in a conspicuous part of the building in which his office is situated.

4. (1) When a marriage is intended to be solemnized under the Act by a Marriage Officer, the parties to the intended marriage shall give notice thereof in writing in the Form I specified in the Schedule appended to these rules to such Officer either in person or by registered post.

(2) Where the notice is delivered in person, the fee prescribed therefor in Rule 14 shall be paid in cash to the Marriage Officer.

(3) Where the notice is sent by registered post, the fee shall be remitted by money order at the remitter's expenses and the receipt issued to the remitter by the post office through which the remittance is made shall be attached to the notice.

5. (1) As soon as the notice is received, the Marriage Officer shall enter a distinctive serial number on it and he shall attest by his signature such number and date of receipt of the notice.

(2) If the notice is in conformity with the requirements of the Act, it shall be entered in the Marriage Notice Book and copied correctly in verbatim in Marriage Notice Register which shall be certified to be correctly copied by the Marriage Officer. The Notice Book and the Notice Register shall be bound volume the pages of which are machine-numbered consecutively with a nominal index attached.

(3) If the notice is not in conformity with the requirements of the Act, it shall be returned to the parties for rectification and transmission within a date to be fixed for the purpose.

(4) Every item of rectification shall be attested by both the parties to the intended marriage.

6. The Marriage Officer shall cause the notice of the intended marriage to be published by affixing a true copy of the notice under his seal and signature at a conspicuous part of his office.

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7. Where an objection to the solemnization of an intended marriage together with fee prescribed thereof in Rule 14, has been received within 30 days from the date of publication of the notice of the marriage and recorded by the Marriage Officer he shall, unless he rejects the objection summarily by an order in writing on the ground that the objection is not based on contravention of any of the conditions specified in Section 5, enquire into the objection on a date to be fixed by him.

The date so fixed shall not be later than fifteen days from the date of the objection.

8. The Marriage Officer shall, at the time of recording the objection ascertain from the objector whether he has any document on which he relies or whether he desires any witness or witnesses to be examined on his behalf. If the objector states that he has, the Marriage Officer shall require the objector to produce the documents or the witnesses on the day fixed for the enquiry. If the objector desire that summons shall be issued to the witnesses to appear and give evidence or to produce any documents, the Marriage Officer shall issue such summons to the witnesses cited, on payment of the process fee prescribed under Rule 14, and the reasonable expenses of travelling and subsistence allowance of the witness. The enquiry relating to the objection including the production of documents and the examination of witness shall be completed and the decision of the Marriage Officer arrived at within the period of 15 days. If, within the prescribed period the documents are not produced and the witnesses do not appear before the Marriage Officer, the Marriage Officer shall take a decision without waiting for the production of such documents or the appearance of such witnesses.

9. The Marriage Officer shall give notice of the date and time fixed for enquiry to the parties to the intended marriage.

10. (i) The notice or summons to any party or witness under Rule 8, shall be in Form II or Form III, as the case may be, and shall be sent by registered post.

(ii) Any witness who being so summoned intentionally fails to attend at the place and at the time or departs from the place where he has been summoned to attend, shall be punishable under Section 174, I. P. C.

11. On the date fixed for enquiry or on any adjourned date the Marriage Officer shall record in his own hand the evidence given in the course of the enquiry, his decision on the objection and the reasons therefor.

12. The Marriage Officer may, on application by both the parties to the marriage, solemnize the same at any place outside his office provided the additional fee prescribed therefor in Rule 14, is paid and the hour is not unreasonable.

13. The Marriage Certificate Book shall be bound volume, the pages of which are machine-numbered consecutively with a nominal index attached. Every marriage certificate entered therein during each calendar year shall be consecutively numbered and every authenticated copy of a certificate issued to the parties shall bear this number and the date, month and year in which the certificate was issued.

14. The following fees shall be levied by the Marriage Officer :

(i) For every notice of intended marriage or for application for registration of a marriage (to be paid by the parties to the marriage) —Rs. 2 ;

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(ii) For recording an objection (to be paid by the person making the objection)—Rs. 3 ;

(iii) An enquiry to be made thereupon (to be paid by person making the objection) - Rs. 3 :

(iv) For every notice and for every summons (to be paid by the person making the objection)—Re. 1 ;

(v) For solemnizing or registering a marriage (to be paid by the parties to the marriages) - Rs. 6 ;

(vi) For solemnizing or registering a marriage outside the office of Marriage Officer (to be paid by the parties to the marriage) :

(a) upto a distance of 5 miles from office – Rs. 5 ;

(b) for a distance more than 5 miles at 25 P. per mile in addition to what has been prescribed under clause (a) ;

(vii) For a certified copy of an entry (to be paid by the applicant)—

(a) in Marriage Notice Book other than an entry relating to an objection – Re. 1 ;

(b) in the Marriage Certificate Book—Re. 1.

(viii) For certified copy of an entry in Marriage Book other than a notice or of any other proceeding not already provided for (to be paid by the applicant) – Rs. 6 ;

(ix) For making a search (to be paid by the applicant) —

(a) if the entry is of the current year—Re. 1 ;

(b) if the entry related to any previous year or years—Additional fee of 50 P. per year.

(x) For issue of commission (to be paid by the applicant) - Rs. 10 ;

(xi) For every other application which may be necessary under the Act (to be paid by the applicant)—Re. 1.

The fees prescribed above shall be paid either in person or remitted by money order to the Marriage Officer.

15. A receipt duly signed by the Marriage Officer shall be issued for all fees received by him under the Act and these Rules. The receipt books shall be bound volumes of one hundred leaves each with foils and counter-foils which shall be machine-numbered consecutively (Form IV).

All moneys received by the Marriage Officer except the fee mentioned in entry (vi) of Rule 14 shall be remitted to the local treasury.

16. Copies of entries in the Marriage Certificate Book shall be certified in Form V, apprehend to these rules and shall be sent at intervals of three months to the Registrar General of Births and Deaths and Marriages, Assam. Should no entries have been made during the preceding three months, a certificate to this effect shall be sent to the Registrar General of Births, Deaths and Marriages, Assam.

17. The Marriage Officer shall maintain a cash book in Form VI. All fees received under the Act and the Rules shall be brought to account in the cash book every day and the Marriage Officer shall sign the same in token of his verifying the correctness of the day's total collection of fees.

18. The Marriage Officer shall keep in his custody the fees received by him each day, and shall credit the same on the day following, into the nearest treasury or Bank, as the case may be.

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19. Notwithstanding anything contained in the Act and these rules, the registration of Hindu Marriages in Assam excepting those areas where the Indian Registration Act, 1908 does not apply, shall be optional.

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3. KERALA

KERALA HINDU MARRIAGE REGISTRATION RULES, 1957[1]

In exercise of the powers conferred by sub-section (i) of Section 8 of the Hindu Marriage Act, 1955 (Act XXV of 1955), the Government of Kerala hereby makes the following Rules for the registration of the Hindu Marriage namely :

1. **Short title.**—These rules may be called the Kerala Hindu Marriage Registration Rules, 1957.

2. **Commencement.**—They shall come into force on such date as the Government may by notification in the Gazette appoint.

3. **Definitions.**—In these Rules, unless the context otherwise requires.—

(a) "Registrar General" means the Registrar General of Births, Deaths and Marriages appointed by the Government under Section 6 of the Births, Deaths and Marriages Act, 1886 (Central Act VI of 1886).

(b) "Local Registrar" means any person appointed by Government in accordance with Rule 4 to be Registrar of Marriages for—

(i) the whole or part of the local area comprised within the limits of Trivandrum City, or

(ii) the whole or part of a local area comprised in any municipality in Kerala State established under the provisions of law for the time being in force, or

(iii) the whole or part of a revenue village or group of Revenue villages.

(c) 'Local Registration area' means the jurisdiction assigned to a local Registrar ;

(d) 'Compulsory Registration area' means the local registration area in which registration of marriages is declared by the Government to be compulsory in accordance with sub-section (2) of Section 8 ;

(e) 'Marriage' means a marriage solemnized in accordance with the provisions of the Act ;

(f) 'Register' means the Hindu Marriage Register kept in Form II in accordance with Section 8 ;

(g) 'Act' means the Hindu Marriage Act, 1955 (Central Act XXV of 1955) ;

(h) 'Section' means a section of the Act ;

(i) 'The Government' means the Government of Kerala ;

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1. Published in the Kerala Gazette No. 43, dated 22-10-1957.

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(j) 'Inspecting Officer' means any officer deputed by the Registrar General to inspect the marriage records ;

(k) 'Form' means a form appended to these Rules.

4. Government may appoint by notification in the Gazette any person by name or by virtue of the office held by him to be a Local Registrar and define 'the Local Registration area' constituting his jurisdiction.

5. The Local Registrar shall unless permitted otherwise by the Registrar General reside within his jurisdiction and maintain an office at the outdoor of which shall be displayed a signboard indicating his designation and hours of business.

6. As soon as may be possible and not later 15 days after the solemnization of a marriage, the husband may and in compulsory registration area shall give or cause to be given a report about the marriage in Form No. 1 (in original and duplicate) to the Local Registrar in whose jurisdiction the marriage was solemnized. The report may be sent by registered post or delivered personally or through messenger. In case a marriage report is delivered personally or through messenger, the Local Registrar shall give a receipt indicating the fact of his having received the report. The date on which the marriage report was received shall be indicated in the receipt as also in the marriage report and attested by the initials of the Local Registrar.

7. The Local Registrar shall after verifying the entries in the marriage report referred to in Rule 6 for accuracy and completeness enter the various particulars in a Register in Form II and attest his signatures in the space specified therein. The entries relating to each marriage shall be given serial numbers consecutively beginning with the first day of January and ending with the last day of December.

8. The Register referred to in Rule 7 shall be a bound book the pages of which are machine-numbered.

9. No correction of the entries in the Register shall be made without the concurrence of an 'Inspecting Officer', changes in material particulars like name, age. date, etc., shall be done invariably only after obtaining the sanction of the Registrar General.

10. (1) The Local Registrar shall within a week after the close of each month despatch the duplicates of the marriage reports received and registered by him and forward the same to the Registrar General :

Provided that if it is directed by the Registrar General that the duplicate report shall be forwarded through a specified authority the reports shall be forwarded through the authority so specified.

(2) The originals of the marriage report received by the Local Registrar shall be filed by him as permanent record.

11. The Registrar General shall have all the duplicate marriage reports received from the Local Registrars scrutinised for accuracy and completeness and file them in his office as permanent record.

12. The Registrar General shall cause indexes of marriage reports received by him being prepared and maintained in his office. The index registers shall be in bound books, the pages of which are machine-numbered and

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may be kept open for inspection by any person who desires to do so during office hours.

13. Application for certified extract of the Register shall fulfil the following conditions :

(i) it shall be addressed to the Registrar General or Local Registrar ;

(ii) it shall contain the name of the parties to the marriage, the name and address of the applicant and the place and the date of the marriage ;

(iii) court-fee stamps to the value of One Rupee shall be affixed to it.

14. The Local Registrar shall prepare and grant the extract under the signature and seal in Form No. III :

Provided that if the Registrar General directs that the extract shall be counter-signed by any authority duly specified by him before delivery to the applicant the Local Registrar shall comply with such direction.

15. (1) The Registrar General may authorise any officer to be an Inspecting Officer for the purpose of the rules and assign the jurisdiction of such Inspecting Officer, subject to approval of Government.

(2) Regular periodical inspection of the Registers and connected records kept by the Local Registrars shall be done by the Inspecting Officers in accordance with the instructions of the Registrar General.

(3) The Registrar General shall arrange for the printing and supply of forms of registers required for use by Local Registrars.

16. (1) Notwithstanding any of the provisions contained in these rules the failure by a party to a marriage to comply with a direction in Rule 6 shall, if the marriage had been solemnized in a compulsory registration area be punishable on conviction by a Magistrate with fine which may extend to twenty-five rupees.

(2) Prosecutions of offences referred to in sub-rule (i) shall be instituted only with the sanction of the Registrar General.

(3) The rules passed by Government under any other enactment for the time being in force for the registration of marriages of any section of the Hindus shall for 'compulsory registration areas' stand repealed.

———

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APPENDIX VI

THE DOWRY PROHIBITION ACT, 1961

(No. 28 of 1961)

[20th May, 1961]

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Section

1. Short title, extent and commencement.
2. Definition of "dowry".
3. Penalty for giving or taking dowry.
4. Penalty for demanding dowry.
5. Agreement for giving or taking dowry to be void.
6. Dowry to be for the benefit of the wife or her heirs.
7. Cognizance of offences.
8. Offences to be non-cognizable, bailable and non-compoundable.
9. Power to make rules.
10. Repeals.

An Act to prohibit the giving or taking of dowry

Be it enacted by Parliament in the Twelfth Year of the Republic of India as follows :

1. Short title, extent and commencement.—(1) This Act may be called the Dowry Prohibition Act, 1961.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definition of "dowry".—In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage ; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person ;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation I.—For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.

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Explanation II.—The expression "valuable security" has the same meaning as in Section 30 of the Indian Penal Code (45 of 1860).

3. **Penalty for giving or taking dowry.**—If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

4. **Penalty for demanding dowry.**—If any person, after the commencement of this Act, demands, directly or indirectly, from the parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both :

Provided that no court shall take cognizance of any offence under this section except with the previous sanction of the State Government or of such officer as the State Government may, by general or special order, specify in this behalf.

5. **Agreement for giving or taking dowry to be void.**—Any agreement for the giving or taking of dowry shall be void.

6. **Dowry to be for the benefit of the wife or her heirs.**—(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman—

(a) if the dowry was received before marriage, within one year after the date of marriage ; or

(b) if the dowry was received at the time of or after the marriage, within one year after the date of its receipt ; or

(c) if the dowry was received when the woman was a minor, within one year after she has attained the age of eighteen years ;

and pending such transfer, shall hold it in trust for the benefit of the woman.

(2) If any person fails to transfer any property as required by sub-section (1) and within the time limited therefor, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both ; but such punishment shall not absolve the person from his obligation to transfer the property as required by sub-section (1).

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.

(4) Nothing contained in this section shall affect the provisions of Section 3 or Section 4.

7. **Cognizance of offences.**—Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898),—

(a) no court inferior to that of a presidency magistrate or a magistrate of the first class shall try any offence under this Act ;

(b) no court shall take cognizance of any such offence except on a complaint made within one year from the date of the offence ;

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(c) it shall be lawful for a presidency magistrate or a magistrate of the first class to pass any sentence authorised by this Act on any person convicted of an offence under this Act.

8. Offences to be non-cognizable, bailable and non-compoundable – Every offence under this Act shall be non-cognizable, bailable and non-compoundable.

9. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

10. Repeals.—The Andhra Pradesh Dowry Prohibition Act, 1958 (A. P. Act 1 of 1958), and the Bihar Dowry Restraint Act, 1950, Bihar Act 25 of 1950), are hereby repealed.

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APPENDIX VII

THE CHILD MARRIAGE RESTRAINT ACT, 1929

(Act No. 19 of 1929 as amended by Act 2 of 1978)

[1st October, 1929].

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6. Punishment for parent or guardian concerned in a child marriage.
7. Offences to be cognizable for certain purposes.
8. Jurisdiction under this Act.
9. Mode of taking cognizance of offences.
10. Preliminary inquiries into offences.
11. Repealed.
12. Power to issue injunction prohibiting marriage in contravention of this Act.

An Act to restrain the solemnization of child marriages

Whereas it is expedient to restrain the solemnization of child marriages; It is hereby enacted as follows :

1. **Short title, extent and commencement.**—(1) This Act may be called the Child Marriage Restraint Act, 1929.

(2) It extends to the whole of India except the State of Jummu and Kashmir and it applies also to all Citizens of India without and beyond India ;

Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry.

(3) It shall come into farce on the 1st day of April, 1930.

2. **Definitions.** In this Act, unless there is anything repugnant in the subject or context,—

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(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completede ighteen years of age ;

(b) "child marriage" means a marriage to which either of the contracting parties is a child ;

(c) "contracting party" to a marriage means either of the parties whose marriage is or is about to be thereby solemnised ; and

(d) "minor" means a person of either sex who is under eighteen years of age.

3. Punishment for male adult below twenty-one years of age marrying a child.—Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both.

4. Punishment for male adult above twenty-one years of age marrying a child. - Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine.

5. Punishment for solemnizing a child marriage.—Whoever performs, conducts or directs any child marriage shall be punishable with simple imrisonment which may extend to three monts and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in a child marriage.—(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine :

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

7. Offences to be congnizable for certain purposes.—The Code of Criminal Procedure 1973 (2 of 1974), shall apply to offences under this Act as if they were cognizable offences—

(a) for the purpose of investigation of such offences ; and

(b) for the purposes of matters other than (i) matters referred to in Section 42 of that Code, and (ii) the arrest of a person without a warrant or without an order of a Magistrate.

8. Jurisdiction under this Act.—Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure, 1973 (2 of 1974), no Court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall take cognizance of, or try, any offence under this Act.

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9. Mode of taking cognizance of offences —No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.

10. Preliminary inquiries into offences.—Any Court, on receipt of a complaint of an offence of which it is authorised to take cognizance, shall, unless it dismisses the complaint under Section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) either itself make an inquiry under Section 202 of that Code or direct a Magistrate subordinate to it to make such inquiry.

11. Power to take security from complainant – Repealed by the Child Marriage Restraint (Amendment) Act, 1949 (41 of 1949), Section 7.

12. Power to issue injunction prohibiting marriage in contravention of this Act. – (1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in Sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader ; and if the Court rejects the application wholly or in part, it shall record in writing its reasons ; for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both !

Provided that no woman shall be punishable with imprisonment.

———

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APPENDIX VIII

THE INDIAN CHRISTIAN MARRIAGE ACT, 1872

(Act No. 15 of 1872)

[18th July, 1872]

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An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians

Preamble.—Whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion ; It is hereby enacted as follows :—

PRELIMINARY

1. **Short title.**—This Act may be called the Indian Christian Marriage Act, 1872.

Extent.—It extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in the States of Travancore-Cochin, manipur and Jammu and Kashmir.

* * * *

STATE AMENDMENT

PONDICHERRY—In Section 1 add the following :

"Provided that nothing contained in this Act shall apply to the Renoncants on of the Union territory of Pondicherry—Act 26 of 1968, Section 3."

MEGHALAYA—For the second para of Section 1 substitute ;

"It extends to the whole of Meghalaya"—Meghalaya A. L. O. (No. 3), 1973.

2. [Enactments repealed.] Rep. by the Repealing Act, 1938 (1 of 1938). Section 2 and Schedule, Part I.

3. **Interpretation clause.**—In this Act unless there is something repugnant in the subject or context,—

"Church of England" and "Anglican" mean and apply to the Church of England as by law established ;

"Church of Scotland" means the Church of Scotland as by law established ;

"Church of Rome" and "Roman Catholic" mean and apply to the Church which regards the Pope of Rome as its spiritual head ;

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"Church" includes any chapel or other building generally used for public Christian worship ;

"India" means the territories to which this Act extends ;

"minor" means a person who has not completed the age of twenty-one years and who is not a widower or a widow ;

* * * *

the expression "Christian" means persons professing the Christian religion ;

and the expression "Indian Christians" includes the Christian descendants of natives of India converted to Christianity, as well as such converts ;

"Registrar General of Births, Deaths and Marriages" means a Registrar General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886 (6 of 1886).

It has been extended to Union territory of Pondicherry by the Pondicherry (Extension of Laws) Act, 1968 (26 of 1968) subject to the following proviso :

"Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry."

STATE AMENDMENT

KARNATAKA.- For the definition of "Registrar-General of Births, Deaths and Marriages", substitute the following :

"Registrar-General of Births, Deaths and Marriages means "the Registrar-General of Births, Deaths and Marriages appointed under the Mysore Registrar-General of Births, Deaths and Marriages Act, 1956,"—Mysore Act 20 of 1956, Section 10 (29-10-1956) r/w Act 31 of 1973, Section 5 (1-11-1973).

PART I

The Persons by Whom Marriages may be Solemnized

4. Marriages to be solemnized according to Act.—Every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section ; and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

5. Persons by whom marriages may be solemnized. Marriages may be solemnized in India—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister ;

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland ;

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(3) by any Minister of Religion licensed under this Act to solemnize marriages ;

(4) by, or in the presence of, a Marriage Registrar appointed under this Act ;

(5) by any person licensed under this Act to grant certificates of marriage between Indian Christians.

6. Grant and revocation of licences to solemnize marriages.—The State Government, so far as regards the territories under its administration, may by notification in the Official Gazette, grant licences to Ministers of Religion to solemnize marriages within such territories and may, by a like notification, revoke such licenses.

7. Marriage Registrars.—The State Government may appoint one or more Christians, either by name or as holding any office for the time being to be the Marriage Registrar or Marriage Registrars for any district subject to its administration.

Senior Marriage Registrar.—Where there are more Marriage Registrars than one in any district, the State Government shall appoint one of them to be the Senior Marriage Registrar.

Magistrate when to be Marriage Registrar.—When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness, or temporary vacancy.

STATE AMENDMENT

KARNATAKA.—Substitute the words "District Magistrate" for the words "Magistrate of the district"—Mysore Act 13 of 1965, Section 66 and Schedule (1-10-1965) r/w Act 31 of 1973, Section 5 (1-11-1973).

8. Marriage Registrars in Indian States.—Rep. by the A.O. 1950.

9. Licensing of persons to grant certificates of marriage between Indian Christians. - The State Government may grant a licence to any Christian, either by name or as holding any office for the time being, authorizing him to grant certificates of marriage between Indian Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the Official Gazette.

PART II

Time and Place at Which Marriages may be Solemnized

10. Time for solemnizing marriage.—Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening :

Exceptions. - Provided that nothing in this section shall apply to –

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

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(2) a Clergyman of the Church of Rome Solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence, or

(3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland.

11. Place for solemnizing marriage.—No Clergyman of the Church of England shall solemnize a marriage in any place other than a Church where worship is generally held according to the forms of the Church of England,

unless there is no such church within five miles distance by the shortest road from such place, or

unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary.

Fee for special licence.—For such special licence, the Registrar of the Diocese may charge such additional fee as the said Bishop from time to time authorizes.

PART III

Marriages solemnized by Ministers of Religion licensed under this Act

12. Notice of intended marriage.—Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing, according to the form contained in the First Schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein –

(a) the name and surname, and the profession or condition, of each of the persons intending marriage ;

(b) the dwelling-place of each of them ;

(c) the time during which each has dwelt there ; and

(d) the church or private dwelling in which the marriage is to be solemnized :

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

13. Publication of such notice.—If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

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Return or transfer of notice.—But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

14. Notice of intended marriage in private dwelling.—If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in Section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

15. Sending copy of notice to Marriage Registrar when one party is a minor.—When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless within twenty-four hours after its receipt he returns the same under the provisions of Section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

16. Procedure on receipt of notice.—The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

17. Issue of certificate of notice given and declaration made.—Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made :

Proviso.—Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister;

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue ; and

(3) that the is ue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorised in that behalf.

18. Declaration before issue of certificate.—The certificate mentioned in Section 17 shall not be issued until one of the persons intending marriages has appeared persona ly before the Minister and made a solemn declaration—

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and, when either or both of the parties is or are a minor or minors,

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

19. Consent of father or guardian or mother.—The father, if living, of any minor, or, if the father be dead, the guardian of the person of such

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minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage.

and such consent is hereby required for the same marriage, unless no person authorised to give such consent be resident in India.

20. Power to prohibit by notice issue of certificate. Every person whose consent to a marriage is required under Section 19, is hereby authorised to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorised with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorised as aforesaid.

21. Procedure on receipt of notice.—If any such notice be received by such Minister, he shall not issue his certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful au hority for such prohibition,

or until the said notice is withdrawn by the person who gave it.

22. Issue of certificate in case of minority.—When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by Section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

23. Issue of certificates to Indian Christians.—When any Indian Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under Section 17, such Minister shall, before issuing the certificate, ascertain whether such Indian Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Indian Christian into some language which he understands.

24. Form of certificate.—The certificate to be issued by such Minister shall be in the form contained in the Second Schedule hereto annexed, or to the like effect.

25. Solemnization of marriage.—After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt :

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

26. Certificate void if marriage not solemnized within two months.—Whenever a marriage not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any) thereon shall be void,

and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid.

PART IV

Registration of Marriages Solemnized by Ministers of Religion

27. Marriages when to be registered.—All marriages hereafter solemnized in India between persons one or both of whom professes or profess the

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Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered in manner hereinafter prescribed.

28. Registration of marriages solemnized by Clergymen of Church of England. - Every Clergyman of the Church of England shall keep a register of marriages and shall register therein, according to the tabular form set forth in the Third Schedule hereto annexed, every marriage which he solemnizes under this Act.

29. Quarterly returns to Archdeaconry.—Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

Contents of returns.—Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year, respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified

The said Registrar upon receiving the said returns shall send one copy thereof to the Registrar General of Births, Deaths and Marriages.

30. Registration and returns of marriages solemnized by Clergymen of Church of Rome.—Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

and such person shall forward quarterly to the Registrar General of Births, Deaths and Marriages returns of the entries of all marriages registered by him during the three months next preceding.

31. Registration and returns of marriages solemnized by Clergymen of Church of Scotland.—Every Clergyman of the Church of Scotland shall keep a register of marriages,

and shall register therein, according to the tabular form set forth in the Third Schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the Registrar-General of Births, Deaths, and Marriages, through the senior Chaplain of the Church of Scotland, returns, similar to those prescribed in Section 29, of all such marriages.

32. Certain marriages to be registered in duplicate.—Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same ; (that is to say) in a marriage-register-book to be kept by him for that purpose, according to the form contained in the Fourth Schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

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33. Entries of such marriages to be signed and attested.—The entry of such marriage in both the certificate and marriage-register-book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

34. Certificate be forwarded to Marriage Registrar, copied and sent to Registrar-General.—The person solemnizing the marriage shall forthwith separate the certificate from the Marriage-register-book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the district in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

who shall cause such certificate to be copied into a book to be kept by him for that purpose,

and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the Registrar-General of Births, Deaths and Marriages.

35. Copies of certificates to be entered and numbered.- Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

36. Registrar to add number of entry to certificate and send to Registrar-General.—The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of very month, send the same to the Registrar General of Births, Deaths and Marriages.

37. Registration of marriages between Indian Christians, by persons referred to in clauses (1), (2) and (3) of Section 5.—When any marriage between Indian Christians is solemnized by any such person, Clergyman or Minister of Religion as is referred to in clause (1), clause (2) or clause (3) of Section 5, the person solemnizing the same shall, instead of proceeding in the manner provided by Sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Custody and disposal of register-book.- Whoever has the control of the book at the time when it is filled, shall send it to the Marriage Registrar of the district, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with the records of his office.

PART V

Marriages solemnized by, or in the presence of, a Marriage Registrar

38. Notice of intended marriage before Marriage Registrar.—When a marriage is intended to be solemnized by, or in the presence of, a Marriage

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Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the First Schedule hereto annexed, or to the like effect, to any Marriage Registrar of the district within which the parties have dwelt,

or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district,

and shall state therein the name and surname and the profession or condition, of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized :

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

39. **Publication of notice.**—Every Marriage Registrar shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

40. **Notice to be filed and copy entered in Marriage-Notice-Book.** The Marriage Registrar shall file all such notices and keep them with the records of his office,

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the State Government, and to be called the "Marriage-Notice-Book",

and the Marriage-Notice-Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

41. **Certificate of notice given and oath made.**—If the party by whom the notice was given requests the Marriage Registrar to issue the certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made :

Proviso—Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue ;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorised in that behalf by this Act ;

that four days after the receipt of the notice have expired ; and further ;

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

42. **Oath before issue of certificate.**—The certificate mentioned in Section 41 shall not be issued by any Marriage Registrar, until one of the

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parties intending marriage appears personally before such Marriage Registrar, and makes oath—

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorised to give such consent, as the case may be.

43. Petition to High Court to order certificate in less than fourteen days.—When one of the parties, intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being marred in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by Section 41.

Order on petition.—And on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

44. Consent of father or guardian.—The provisions of Section 19 apply to every marriage under this Part, either of the parties to which is a minor.

Protest against issue of certificate. And any person whose consent to such marriage would be required thereunder may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the Marriage-Notice Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorised.

Effect of protest—When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be withdrawn by the person who entered it.

45. Petition where person whose consent is necessary is insane, or unjustly withholds consent. If any person whose consent is necessary to any marriage under this part is of unsound mind,

or if any such person (other than the father) without just cause withholds his consent to the marriage,

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the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge.

Procedure on petition.—And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way;

and, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be, shall declare the marriage to be a proper marriage;

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Pa t in relation to the marriage as if the issue of such certificate had not been forbidden.

46. Petition when Marriage Registrar refuses certificate.—Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

Procedure on petition.—The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance threwith.

47. Petition when Marriage Registrar in Indian State refuses certificate.—Rep. by the A. O. 1950.

48. Petition when Registrar doubts authority of person forbidding.—Whenever a Marriage Registrar, acting under the provisions of Section 44, is not satisfied that the person forbidding the issue of the certificate is authorised by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district be not within any of the said towns, then to the District Judge.

Procedure on petition.—The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same,

and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case,

and if, upon such examination, it appears that the person forbidding the issue of such certificate is not authorised by law so to do, such Judge of the

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High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorised as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

49. Liability for frivolous protest against issue of certificate. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on ground which such Mariage Registrar, under Section 44, or a Judge of the High Court or the District Judge, under Section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages to be recovered by suit by the person against whose marriage such protest was entered.

50. Form of certificate.—The certificate to be issued by the Marriage Registrars under the provisions of Section 41 shall be in the form contained in the Second Schedule to this Act annexed or to the like effect,

and the State Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

51. Solemnization of marriage after issue of certificate. After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect :—

"I do solemnly declare that I know not of any lawful impediment why I, A B., may not be joined in matrimony to C.D."

And each of the parties shall say to the other as follows or to the like effect :—

"I call upon persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife (or husband)."

52. When marriage not had within two months after notice, new notice required.—Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by Section 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void ;

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.

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53. Marriage Registrar may ask for particulars to be registered.—A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

54. Registration of marriages solemnized under Part V. After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith Register the marriage in duplicate; that is to say, in a marriage-register-book, according to the form of the Fourth Schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register-book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

55. Certificates to be sent monthly to Registrar-General.—The Marriage Registrar shall forthwith separate the certificate from the marriage-register-book and send it, at the end of every month, to the Registrar-General of Births, Deaths and Marriages.

Custody of register-book.—The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with the records of his office.

56. Officers to whom Registrars in Indian States shall send certificates.—Rep. by the A.O. 1950.

57. Registrars to ascertain that notice and certificate are understood by Indian Christians.—When any Indian Christian about to be married gives a notice of marriage, or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Indian Christian understands the English language, and, if he does not, the Marriage Registrar shall translate, or cause to be translated, such notice or certificate, or both of them, as the case may be, to such Indian Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the Indian Christian is cognisant of the purport and effect of the said notice and certificate.

58. Indian Christians to be made to understand declarations.—When any Indian Christian is married under the provisions of this Part, the person solemnizing the marriage shall ascertain whether such Indian Christian understands the English language, and, if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Indian Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

59. Registration of marriages between Indian Christians.—The registration of marriages between Indian Christians under this Part shall be made

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in conformity with the rules laid down in Section 37 (so far as they are applicable), and not otherwise.

PART VI

Marriage of Indian Christians

60. On what conditions marrriages of Indian Christians may be certified.—Every marriage between Indian Christians applying for a certificate, shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise :—

(1) the age of the man intending to be married shall not be under twenty-one years and the age of the woman intending to be married shall not be under eighteen years ;

(2) neither of the persons intending to be married shall have a wife or husband still living ;

(3) in the presence of a person licensed under Section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

"I call upon these persons here present to witness that I, A.B., in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, C. D., to be my lawful wedded wife or husband", or words to the like effect :

61. Grant of certificate. - When, in respect to any marriage solemnized under this Part, the conditions prescribed in Section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and, on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

* * * *

62. Keeping of register-book and deposit of extract therefrom with Registrar-Genaral.—(1) Every person licensed under Section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the State Government by which he was licensed may from time to time prescribe, a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths and Marriages for the territories under the administration of the said State Government, in such form and at such intervals as that Government may prescribe, true and duly authenticated extract from his register-book of all entries made therein since the last of those intervals.

* * * *

63. Searches in register-book and copies of entries.—Every person licensed under this Act to grant certificate of marriage, and keeping a

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marriage-register-book under Section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of any entry therein.

64. Books in which marriages of Indian Christian under Part I or Part III are registered.—The provisions of Sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searchest hereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under Section 37.

65. Part VI not to apply to Roman Catholics. Saving of certain marriages.—This Part of this Act, except so much of Sections 62 and 63 as are referred to in Section 64, shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. 25 of 1864, previous to the twenty-third day of February, 1865.

PART VII

Penalties

66. False oath, declaration, notice or certificate for procuring marriage.—Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath of declaration or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under Section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.

67. Forbidding by false personation, issue of certificate by Marriage Registrar.—Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in Section 205 of the Indian Penal Code (45 of 1860).

68. Solemnizing marriage without due authority. Whoever, not being authorized by Section 5 of this Act to solemnize marriages, solemnizes or professes to solemnize, in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

* * * *

and shall also be liable to fine.

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69. Solemnizing marriage out of proper time, or without witnesses.—Whoever knowingly and wilfully solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Saving of marriages solemnized under special licence.—This section does not apply to marriages solemnized under special licences granted by the Anglican Bishop of the Diocese or by his Commisary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special licence in that behalf mentioned in Section 10.

Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.

70. Solemnizing, without notice or within fourteen days after notice, marriage with minor.—Any Minister of Religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

71. Issuing certificate, or marrying, without publication of notice.—A Marriage Registrar under this Act, who commits any of the following offences :—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act ;

(2) *Marrying after expiry of notice.*—after the expiration of two months after the copy of the notice has been entered as required by Section 40 in respect of any marriage, solemnizes such marriage ;

(3) *Solemnizing marriage with minor within fourteen days, without authority of Court or without sending copy of notice,*— solemnizes, without an order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district than one, and if he himself be not the Senior Marriage Registrar ;

(4) *Issuing certificate against authorised prohibition.*—issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof,

shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

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72. Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice, or against authorized prohibition.—Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of two months after the notice has been entered by him as aforesaid,

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under Section 166 of the Indian Penal Code (45 of 1860).

73. Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome).— Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church,

Issuing certificate, or marrying, without publishing notice or after expiry of certificate.—knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him ;

Issuing certificate for, or solemnizing marriage with minor, within fourteen days after notice.—or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district ;

Issuing certificate authorizedly forbidden.— or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue ;

Solemnizing marriage authorizedly forbidden. or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same ; shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. Unlicensed person granting certificate pretending to be licensed.— Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

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Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees.

75. **Destroying or falsifying register-books.**—Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

or wilfully inserts any false entry in any such register-book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

76. **Limitation of prosecutions under Act.**—The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

PART VIII

Miscellaneous

77. **What matters need not be proved in respect of marriage in accordance with Act.**—Whenever any marriage has been solemnized in accordance with the provisions of Sections 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely :—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law ;

(2) the notice of the marriage ;

(3) the certificate or translation thereof ;

(4) the time and place at which marriage has been solemnized ;

(5) the registration of the marriage.

78. **Corrections or errors.**—Every person cherged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry, may within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And, in case such certificate has been already sent to the Registrar-General of Births, Deaths and Marriages, such person shall make and send in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made.

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79. Searches and copies of entries.—Every person solemnizing a marriage under this Act, and hereby required to register the same,

and every Marriage Registrar or Registrar-General of Births, Deaths and Marriages having the custody for the time being of any register of marriages, or of any certificate, or duplicate, or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate or copies, and give a copy under his hand of any entry in the same.

80. Certified copy of entry in marriage register, etc., to be evidence.—Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of any entry of a marriage in such register or of any such certificate or duplicate, shall be received evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate, or duplicate, or of any entry therein, respectively, or of such copy.

81. Certificates of certain marriages to be sent to Central Government. The Registrar General of Births, Deaths and Marriages shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to him, during such quarter, the certificates of the marriages of which the Government by whom he was appointed may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by him to the Central Government.

82. State Government to prescribe fees.—Fees shall be chargeable under this Act for—

receiving and publishing notices of marriages ;

issuing certificates for marriage by Marriage Registrars, and registering marriages by the same ;

entering protests against, or prohibitions of, the issue of certificates for marriage by the said Registrars ;

searching register-books or certificates, or duplicates, or copies thereof; giving copies of entries in the same under Sections 63 and 79.

The State Government shall fix the amount of such fees respectively, and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

83. Power to make rules.—The State Government may make rules in regard to the disposal of the fees mentioned in Section 82, the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act.

84. Power to prescribe fees and rules for Indian States.—Rep. by the A. O. 1950.

85. Power to declare who shall be District Judge.—The State Government may, by notification in the Official Gazette, declare who shall, if, any place to which this Act applies, be deemed to be the District Judge.

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86. Powers and functions exercisable as regards Indian States.—Rep. by the A. O. 1950.

87. Saving of Consular marriages.—Nothing in this Act applies to any marriage performed by any Minister, Consul or Consular Agent between subjects of the State which he represents and according to the laws of such State.

88. Non-validation of marriages within prohibited degrees.—Nothing in this Act shall be deemed to validate any marriage which he personal law applicable to either of the parties forbids him or her to enter into.

SCHEDULE I

(*See* Sections 12 and 38)

NOTICE OF MARRIAGE

To a Minister (or Registrar) of

I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Martha Green	James Smith	Names
Spinster	Widower	Condition
.....	Carpenter	Rank or profession
Minor	of full age	Age
20, Hastings Street	16, Clive Street	Dwelling place
More than a month	23 days	Length of residence
Free Church of Scotland Church, Calcutta		Church, chapel or place of worship in which the marriage is to be solemnized.
		District in which the other party resides when the parties dwell in different districts.

Witness my hand, this day of seventy-two.

(Signed) JAMES SMITH

(The italics in the Schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district).

SCHEDULE II

(*See* Sections 24 and 50)

CERTIFICATE OF RECEIPT OF NOTICE

I,.....do hereby certify that, on the.....day of....., notice was duly entered in my Marriage Notice Book of the marriage intended betwen the parties therein named and described, delivered under the hand of..... one of the parties (that is to say) :—

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Martha Green	James Smith	Names
Spinster	Widower	Condition
.....	Carpenter	Rank or profession
Minor	Of full age	Age
20, Hastings Street	16, Clive Street	Dwelling place
More than a month	23 days	Length of residence
Free Church of Scotland Church, Calcutta		Church, chapel or place of worship in which the marriage is to be solemnized
		District in which the other party resides, when the parties dwell in different districts.

and that the declaration, or oath required by Section 17 or 41 of the Indian Christian Marriage Act, 1872 (15 of 1872), has been duly made by the said (James Smith).

Date of notice entered
Date of certificate given

The issue of this certificate has not been prohibited by any person authorized to forbid the issue thereof.

Witness my hand, this day of seventy-two.

(Signed)

This certificate will be void, unless the marriage is solemnized on or before the day of

(The italics in the Schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.)

SCHEDULE III

(*See* Sections 28 and 31)

FORM OF REGISTER OF MARRIAGES

Quarterly Returns

of

Marriages

for

The Archdeaconry of { Calcutta, Madras, Bombay,

do hereby certify that the annexed are correct copies of the originals and Official Quarterly Returns of Marriage within the Archdeaconry.

Jangamwadi Math Collection. Digitized by eGangotri

of { Calcutta, Madras, Bombay, } as made and transmitted to me for the quarter commencing

the day of ending the

day of in the year of Our Lord

(Signature of Registrar)

Registrar of the Archdeaconry of { Calcutta, Madras, Bombay,

MARRIAGES solemnized at Allahabad, Barrackpore, Bareilly Calcutta, etc., etc.

When married			Names of parties		Age	Condition	Rank of profession	Residence at the time of marriage	Father's name and surname	By banns or license	Signature of the parties	Signature of two or more witnesses present	Signature of the person solemnizing the marriage
Year	Month	Day	Christian	Surname									

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SCHEDULE IV

(*See* Sections 32 and 54)

Marriage Register Book

No.	When married			Names of parties		Age	Condition	Rank or profession	Residence at the time of marriage	Father's name and surname
	Day	Month	Year	Christian name	Surname					
				James	White	26 years	Widower	Carpenter	Agra	Willam White.
				Martha	Duncan	17 years	Spinster		Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White / Martha Duncan, } in the presence of us { John Smith, / John Green }

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CERTIFICATE OF MARRIAGE

No.	When married			Names of Parties		Age	Condition	Rank or profession	Residence at the time of marriage	Father's name and surname
	Day	Month	Year	Christian name	Surname					
				James	White	26 years	Widower	Carpenter	Agra	William White.
				Martha	Duncan	17 years	Spinster		Agra	John Duncan.

Married in the

This marriage was solemnized between us { James White, Martha Duncan, } in the presence of us { John Smith, John Green }

SCHEDULE V.—[Enactments repealed].—Rep. by the Repealing Act, 1938 (1 of 1938), Section 2 and Schedule, Pt. I.

APPENDIX IX

THE MARRIAGES VALIDATION ACT, 1892[1]

(Act No. 2 of 1892)

[29th January, 1892]

An Act to validate certain marriages solemnized under Part VI of the Indian Christian Marriage Act, 1872

Whereas provision is made in Part VI of the Indian Christian Marriage Act, 1872 (15 of 1872), for the solemnization of marriages between persons of whom both are [2](Indian Christians), but not of marriages between persons of whom one only is [3](an Indian Christian) :

And whereas persons licensed under Section 9 of the said Act have in diverse parts of [4](India), through ignorance of the law, permitted marriages to be solemnized in their presence under the said Part between persons of whom one is [5](an Indian Christian) and the other is not [5](an Indian Christian) ;

And whereas it is expedient that such marriages, having been solemnized in good faith, should be validated ;

It is hereby enacted as follows :—

1. **Commencement.**—Rep. by the Repealing and Amending Act, 1914 (10 of 1914), Section 3 and Schedule II.

2. **Definition.**—In this Act the expression [5]"(Indian Christian)" has the same meaning as in the Indian Christian Marriage Act, 1872 (15 of 1872).

3. **Validation of irregular marriages.** All marriages which have already been solemnized under Part VI of the Indian Christian Marriages Act, 1872 (15 of 1872), between persons of whom one only was[3] (an Indian Christian), shall be as good and valid in law as if such marriages had been solemnized between persons of whom both were[2] (Indian Christians) :

Provided that nothing in this section shall apply to any marriage which has been judicially declared to be null and void, or to any case where either of the parties has, since the solemnization of such marriage and prior to the commencement of this Act, contracted a valid marriage.

4. **Validation of records of irregular marriages.**—Certificates of marriages which are declared by the last foregoing section to be good and valid in law, and register-books, and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the law for the time being in force, in so far as the register-books and extracts relate to such marriages as aforesaid, shall be received as evidence of such marriages as if such marriages had been solemnized between persons of whom both were [5](Indian Christians).

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1. Short title given by the Indian Short Titles Act, 1897 (14 of 1897).
   This Act has been declared to be in force in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (3 of 1872).
2. Subs. by the A. O. 1950, for 'Native Christians".
3. Subs., Ibid., for "a Native Christian".
4. Subs., Ibid., for "the Provinces".
5. Subs., Ibid., for "Native Christian".

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5. Application of Act to marriages under Act 5 of 1865. References in this Act to the Indian Christian Marriage Act, 1872 (15 of 1872), shall, so far as may be requisite, be construed as applying also to the corresponding portions of the [1][Indian Marriage Act, 1865 (5 of 1865].

6. Penalty for solemnizing irregular marriages. If any person licensed under Section 9 of the said Act to grant certificate of marriage between [2][Indian Christians] shall at any time after the commencement of this Act solemnize or affect to solemnize any marriage under Part VI of the said Act or grant any such certificate as therein mentioned, knowing that one of the parties to such marriage or affected marriage was at the date of such solemnization not a Christian, he shall be liable to have his license cancelled, and in addition thereto he shall be deemed to have been guilty of an offence prohibited by Section 73 of the said Act, and shall be punishable accordingly.

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1. Rep. by the Indian Christian Marriage Act, 1872 (15 of 1872).
2. Subs. by the A. O. 1950, for "Native Christians".

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APPENDIX X

THE FOREIGN MARRIAGE ACT, 1969[1]

(No. 33 of 1969)

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1. Published in Gazette of India, Extra., Part III, Section 1, dated 31, 1969, p. 339.

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THE SCHEDULES.

An Act to make provision relating to marriages of citizens of India outside India

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows :

CHAPTER I

Preliminary

1. **Short title.**—This Act may be called the Foreign Marriage Act, 1969.

2. **Definitions.**—In this Act, unless the context otherwise requires,—

(a) "degree of prohibited relationship" shall have the same meaning as in the Special Marriage Act, 1954 (43 of 1954);

(b) "district", in relation to a Marriage Officer, means the area within which the duties of his office are to be discharged ;

(c) "foreign country" means a country or place outside India, and includes a ship which is for the time being in the territorial waters of such a country or place ;

(d) "Marriage Officer" means a person appointed under Section 3 to be a Marriage Officer ;

(e) "official house" in relation to a Marriage Officer, means—

(i) the official house of residence of the officer ;

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(ii) the office in which the business of the officer is transacted ;

(iii) a prescribed place ; and

(f) "prescribed" means prescribed by rules made under this Act.

3. Marriage Officers.—For the purposes of this Act, the Central Government may, by notification in the Official Gazette, appoint such of its diplomatic or consular officers as it may think fit to be Marriage Officers for any foreign country.

Explanation.—In this section, "diplomatic officer" means an ambassador, envoy, minister, high commissioner, commissioner charge d' affairs or other diplomatic repres ntative or a counsellor or secretary of an embassy, legation or high commission.

CHAPTER II

Solemnization of Foreign Marriages

4. Conditions relating to solemnization of foreign marriages.—A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country if, at the time of the marriage, the following conditions are fulfilled, namely ;

(a) neither party has a spouse living,

(b) neither party is an idiot or a lunatic,

(c) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage, and

(d) the parties are not within the degrees of prohibited relationship :

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.

5. Notice of intended marriage.—When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the First Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given, and the notice shall state that the party has so resided.

6. Marriage Notice Book.—The Marriage Officer shall keep all notices given under Section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the "Marriage Notice Book", and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

7. Publication of notice.—Where a notice under Section 5 is given to the Marriage Officer, he shall cause it to be published —

(a) in his own office, by affixing a copy thereof to a conspicuous place, and

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(b) in India and in the country or countries in which the parties are ordinarily resident, in the prescribed manner.

8. **Objection to marriage.**—(1) Any person may, before the expiration of thirty days from the date of publication of the notice under Section 7, object to the marriage on the ground that it would contravene one or more of the conditions specified in Section 4.

Explanation.—Where the publication of the notice by affixation under clause (a) of Section 7 and in the prescribed manner under clause (b) of that section is on different dates, the period of thirty days shall, for the purposes of this sub-section, be computed from the later date.

(2) Every such objection shall be in writing signed by the person making it or by any person duly authorised to sign on his behalf, and shall state the ground of objection ; and the Marriage Officer shall record the nature of the objection in his Marriage Notice Book.

9. **Solemnization of marriage where no objection made** - If no objection is made within the period specified in Section 8 to an intended marriage, then, on the expiry of that period, the marriage may be solemnized.

10. **Procedure on receipt of objection.**—(1) If an objection is made under Section 8 to an intended marriage, the Marriage Officer shall not solemnize the marriage until he has inquired into the matter of the objection in such manner as he thinks fit and is satisfied that it ought not to prevent the solemnization of the marriage of the objection is withdrawn by the person making it.

(2) Where a Marriage Officer after making any such inquiry entertains a doubt in respect of any objection, he shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government ; and the Central Government, after making such further inquiry into the matter and after obtaining such advice as it thinks fit, shall given its decision thereon in writing to the Marriage Officer, who shall act in conformity with the decision of the Central Government.

11. **Marriage not to be in contravention of local laws.**—(1) The Marriage Officer may, for reasons to be recorded in writing, refuse to solemnize a marriage under this Act if the intended marriage is prohibited by any law in force in the foreign country where it is to be solemnized.

(2) The Marriage Officer may, for reasons to be recorded in writing, refuse to solemnize a marriage under this Act on the ground that in his opinion, the solemnization of the marriage would be inconsistent with international law or the comity of nations.

(3) Where a Marriage Officer refuses to solemnize a marriage under this section, any party to the intended marriage may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal ; and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.

12. **Declaration by parties and witnesses.**—Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Second Schedule, and the declaration shall be countersigned by the Marriage Officer.

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13. Place and form of solemnization.—(1) A marriage by or before a Marriage Officer under this Act shall be solemnized at the official house of the Marriage Officer with open doors between the prescribed hours in the presence of at least three witnesses.

(2) The marriage may be solemnized in any form which the parties may choose to adopt :

Provided that it shall not be complete and binding on the parties unless each party declares to other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,—

"I, (A), to be may lawful wife (or husband)" ;

Provided further that where the declaration referred to in the preceding proviso is made in any language which is not understood by the Marriage Officer or by any of the witnesses, either of the parties shall interpret or cause to be interpreted the declaration in a language which the Marriage Officer or, as the case may be, such witness understands.

14. Certificate of marriage.—(1) Whenever a marriage is solemnized under this Act, the Marriage Officer shall enter a certificate thereof in the form specified in the Third Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book, and such certificate shall be signed by the parties to the Marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized, and that all formalities respecting the residence of the party concerned previous to the Marriage and the signatures of witnesses have been complied with.

15. Validity of foreign marriages in India.—Subject to the other provisions contained in this Act, a marriage solemnized in the manner provided in this Act shall be good and valid in law.

16. New notice when marriage not solemnized within six months.—Whenever a marriage is not solemnized within six months from the date on which notice thereof has been given to the Marriage Officer as required under Section 5 or where the record of a case has been transmitted to the Central Government under Section 10, or where an appeal has been preferred to the Central Government under Section 11, within three months from the date of decision of the Central Government in such case or appeal, as the case may be, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until new notice has been given in the manner laid down in this Act.

CHAPTER III

Registration of Foreign Marriages solemnized under other laws

17. Registration of foreign marriages.—(1) Where—

(a) a Marriage Officer is satisfied that a marriage has been duly solemnized in a foreign country in accordance with the law of that country between parties of whom one at least was a citizen of India ; and

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(b) a party to the marriage informs the Marriage Officer in writing that he or she desires the marriage to be registered under this section,

the Marriage Officer may, upon payment of the prescribed fee, register the marriage.

(2) No marriage shall be registered under this section unless at the time of registration it satisfies the conditions mentioned in Section 4.

(3) The Marriage Officer may, for reasons to be recorded in writing, refuset o register a marriage under this section on the ground that in his opinion the marriage is inconsistent with international law or the comity of nations.

(4) Where a Marriage Officer refuses to register a marriage under this section the party applying for registration may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal; and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.

(5) Registration of a marriage under this section shall be effected by the Marriage Officer entering a certificate of the marriage in the prescribed form and in the prescribed manner in the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and by three witnesses

(6) A marriage registered under this section shall, as from the date of registration, be deemed to have been solemnized under this Act.

CHAPTER IV

Matrimonial relief in respect of Foreign Marriages

18. Matrimonial reliefs to be under Special Marriage Act, 1954.—(1) Subject to the other provisions contained in this section, the provisions of Chapters IV, V, VI and VII of the Special Marriage Act, 1954 (43 of 1954), shall apply in relation to marriages solemnized under this Act and to any other marriage solemnized in a foreign country between parties of whom one at least is a citizen of India as they apply in relation to marriages solemnized under that Act.

Explanation.—In its application to the marriages referred to in this sub-section, Section 24 of the Special Marriage Act, 1954 (43 of 1954), shall be subject to the following modifications, namely : –

(i) the reference in sub-section (1) thereof clauses (a), (b), (c) and (d) of Section 4 of that Act shall be construed as a reference to clauses (a), (b), (c) and (d) respectively of Section 4 of this Act, and

(ii) nothing contained in Section 24 aforesaid shall apply to any marriage—

(a) which is not solemnized under this Act ; or

(b) which is deemed to be solemnized under this Act by reason of the provisions contained in Section 17 ;

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Provided that the registration of any such marriage as is referred to in sub-clause (b) may be declared to be of no effect if the registration was in contravention of sub-section (2) of Section 17.

(2) Every petition for relief under Chapter V or Chapter VI of the Special Marriage Act, 1954 (43 of 1954), as made applicable to the marriages referred to in sub-section (1), shall be presented to the district Court within the local limits of whose ordinary civil jurisdiction—

(a) the respondent is residing at the time of the presentation of the petition ; or

(b) the husband and wife last resided together ; or

(c) the petitioner is residing at the time of the presentation of the petition provided that the respondent is at that time residing outside India.

Explanation.—In this section "district Court" has the same meaning as in the Special Marriage Act, 1954 (43 of 1954).

(3) Nothing contained in this section shall authorise any Court—

(a) to make any decree of dissolution of marriage, except where—

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition ; or

(ii) the petitioner being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition ;

(b) to make any decree annulling a voidable marriage, except where—

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition ; or

(ii) the marriage was solemnized under this Act and the petitioner, being the wife, has been ordinarily resident in India for a period of three years immediately preceding the presentation of the petition ;

(c) to make any decree of nullity of marriage in respect of a void marriage, except where—

(i) either of the parties to the marriage is domiciled in India at the time of the presentation of the petition, or

(ii) the marriage was solemnized under this Act and the petitioner is residing in India at the time of the presentation of the petition ;

(d) to grant any other relief under Chapter V or Chapter VI of the Special Marriage Act, 1954 (43 of 1954), except where the petitioner is residing in India at the time of the presentation of the petition.

(4) Nothing contained in sub-sectin (1) shall authorise any Court to grant any relief under this Act in relation to any marriage in a foreign country not solemnized under it, if the grant of relief in respect of such marriage,

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[whether on any of the grounds specified in the Special Marriage Act, 1954 (43 of 1954), or otherwise] is provided for under any other law for the time being in force.

CHAPTER V

Penalties

19. Punishment for bigamy.—(1) Any person whose marriage is solemnized or deemed to have been solemnized under this Act and who, during the subsistence of his marriage, contracts any other marriage in India shall be subject to the penalties provided in Section 494 and Section 495 of the Indian Penal Code (45 of 1860), and the marriage so contracted shall be void.

(2) The provisions of sub-section (1) apply also to any such offence committed by any citizen of India without and beyond India.

20. Punishment for contravention of certain other conditions for marriage.—Any citizen of India who procures a marriage of himself or herself to be solemnized under this Act in contravention of the condition specified in clause (c) or clause (d) of Section 4 shall be punishable—

(a) in the case of a contravention of the condition specified in clause (c) of Section 4, with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees, or with both ; and

(b) in the case of a contravention of the condition specified in clause (d) of Section 4, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

21. Punishment for false declaration.—If any citizen of India for the purpose of procuring a marriage, intentionally—

(a) where a declaration is required by this Act, makes a false declaration ; or

(b) where a notice or certificate is required by this Act, signs a false notice or certificate ;

he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

22. Punishment for wrongful action of Marriage Officer.—Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act in contravention of any of the provisions of this Act shall be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

CHAPTER VI

Miscellaneous

23. Recognition of marriages solemnized under law of other countries.—If the Central Government is satisfied that the law in force in any foreign country for the solemnization of marriages contains provisions similar to those contained in this Act, it may, by notification in the Official Gazette, declare that marriages solemnized under the law in force in such foreign country shall be recognized by Courts in India as valid.

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24. Certification of documents of marriages solemnized in accordance with local law in a foreign country.—(1) Where—

(a) a marriage is solemnized in any foreign country specified in this behalf by the Central Government, by notification in the Official Gazette, in accordance with the law of that country between parties of whom one at least is a citizen of India ; and

(b) a party to the marriage who is such citizen produces to a Marriage Officer in the country in which the marriage was solemnized—

(i) a copy of the entry in respect of the marriage in the marriage register of that country certified by the appropriate authority in that country to be a true copy of that entry ; and

(ii) if the copy of that entry is not in the English language, a translation into the prescribed language of that copy ; and

(c) the Marriage Officer is satisfied that the copy of the entry in the marriage register is a true copy and that the translation, if any, is a true translation ;

the Marriage Officer, upon the payment of the prescribed fee, shall certify upon the copy that he is satisfied that the copy is a true copy of the entry in the marriage register and upon the translation that he is satisfied that the translation is a true translation of the copy and shall issue the copy and the ranslation to the said party.

(2) A document relating to a marriage in a foreign country issued under sub-section (1) shall be admitted in evidence in any proceedings as if it were a certificate duly issued by the appropriate authority of that country.

25. Certified copy of entries to be evidence.—Every certified copy purporting to be signed by the Marriage Officer of an entry of a marriage in the Marriage Certificate Book shall be received in evidence without production or proof of the original.

26. Correction of errors.—(1) Any Marriage Officer who discovers any error in the form or substance of any entry in the Marriage Certificate Book may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other witnesses, correct the error by entry in the margin without any alteration of the original entry and add thereto the date of such correction.

(2) Every correction made under this section shall be attested by the witnesses in whose presence it was made.

27. Act not to affect validity of marriages outside it.—Nothing in this Act shall in any way affect the validity of a marriage solemnized in a foreign country otherwise than under this Act.

28. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the duties and powers of Marriage Officers and their districts ;

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(b) the manner in which a Marriage Officer may hold any inquiry under this Act ;

(c) the manner in which notices of marriage shall be published ;

(d) the places in which and the hours between which marriages under this Act may be solemnized ;

(e) the form and the manner in which any books required by or under this Act to be kept shall be maintained ;

(f) the form and manner in which certificates of marriages may be entered under sub-section (5) of Section 17 ;

(g) the fees that may be levied for the performance of any duty imposed upon a Marriage Officer under this Act ;

(h) the authorities to which, the form in which and the intervals within which copies of entries in the Marriage Certificate Book shall be sent, and, when corrections are made in the Marriage Certificate Book, the manner in which certificates of such corrections shall be sent to the authorities ;

(i) the inspection of any books required to be kept under this Act and the furnishing of certified copies of entries therein ;

(j) the manner in which and the conditions subject to which any marriage may be recognized under Section 23 ;

(k) any other matter which may be, or requires to be, prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so, however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

29. Amendment of Act 43 of 1954.—In the Special Marriage Act, 1954,—

(a) in Section 1, in sub-section (2), for the words "outside the said territories", the words "in the State of Jammu and Kashmir" shall be substituted ;

(b) in Section 2, clauses (a) and (c) shall be omitted ;

(c) in Section 3, for sub-section (2), the following sub-section shall be substituted, namely :—

"(2) For the purposes of this Act, in its application to citizens of India domiciled in the territories to which this Act extends who are in the State of Jammu and Kashmir, the Central Government may, by notification in the Official Gazette specify such officers of the Central Government as it may think fit to be the Marriage Officers for the State or any part thereof."

(d) in Section 4, for clause (c), the following clause shall be substituted, namely :

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"(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends." ;

(e) in Section 10, for the words "outside the territories to which this Act extends in respect of an intended marriage outside the said territories", the words "in the State of Jammu and Kashmir in respect of an intended marriage in the State" shall be substituted ;

(f) in Section 50, in sub-section (1), the words "diplomatic and consular officers and other" shall be omitted.

30. Repeal.—The Indian Foreign Marriage Act, 1903 (14 of 1903), is hereby repealed.

THE FIRST SCHEDULE

(*See* Section 5)

FORM OF NOTICE OF INTENDED MARRIAGE

To

The Marriage Officer

for.....

We hereby give you notice that a marriage under the Foreign Marriage Act, 1969 is intended to be solemnized between us within three months from the date hereof ;

Name and father's name	Condition	Occupation	Date of birth	Dwelling place	Permanent dwelling place and present dwelling place if not permanent	Length of residence in the present dwelling place
A. B.	Unmarried					
	Widower					
	Divorcee					
C. D.	Unmarried					
	Widow					
	Divorcee					

Witness our hands, this.....day of .....19.....

Sd. A. B.

Sd. C. D.

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THE SECOND SCHEDULE

(*See* Section 12)

DECLARATION TO BE MADE BY THE BRIDEGROOM

I, A. B., hereby delcare as follows :

1. I am at the present time unmarried (or a widower or a divorcee, as the case may be).

2. I have completed.....years of age.

3. I am not related to C. D. (the bride) within the degrees of prohibitcd relationship.

4. I am a citizen of.....

(to be filled up)

5. I am aware that, if any statement in this declaration is false, I am liable to imprisonment and also to fine.

Sd. A. B. (the bridegroom)

DECLARATION TO BE MADE BY THE BRIDE

I, C.D., hereby declare as follows :—

1. I am at the present time unmarried (or a widow, or a divorcee, as the case may be).

2. I have completed.....years of age.

3. I am not related to A. B. (the bridegroom) within the degrees of prohibited relationship.

4. I am a citizen of.....

(to be filled up)

5. I am aware that, if any statement in this declaration is false, I am liable to imprisonment and also to fine.

Sd. C.D. (the bride)

Signed in our presence by the above named A.B. and C.D. So far as we are aware, there is no lawful impediment to the marriage.

Sd. G.H.
Sd. I.J.
Sd. K.L.
} Three witnesses.

(Countersigned) E. F.

Marriage Officer

Dated the.....day of.....19.....

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THE THIRD SCHEDULE

(*See* Section 14)

FORM OF CERTIFICATE OF MARRIAGE

I, E.F., hereby certify that on the.....day of.....19..... A B. and C.D.....*appeared before me and that the declaration required by section.....**of the Foreign Marriage Act, 1969, was duly made, and that a marriage under that Act was solemnized between them in my presence and in the presence of three witnesses who have signed hereunder :

Sd. E. F.

Marriage Officer.

Sd. A.B. (bridegroom),

Sd. C.D. (bride).

Sd. G.H.
Sd. I.J.
Sd. K.L. } Three witnesses.

Dated the.....day of.....19.....

*Herein give particulars of the parties.

**To be entered.

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APPENDIX XI

THE FOREIGN MARRIAGE RULES, 1970[1]

In exercise of the powers conferred by Section 28 of the Foreign Act, 1969 (33 of 1969) and in supersession of the Special Marriage (Diplomatic and Consular Officers) Rules, 1955, published with the notification of the Government of India in the Ministry of External Affairs, No. S. R O. 1679, dated the 29th July, 1955, the Central Government hereby makes the following rules, namely :

1. **Short title.**—These rules may be called the Foreign Marriage Rules, 1970.

2. **Definitions.**—In these rules, unless the context otherwise requires—

(a) "Act" means the Foreign Marriage Act, 1969 (33 of 1969) ;

(b) "Form" means a form appended to these rules ;

(c) Marriage Officer" means a person appointed under Section 3 of the Act to be a Marriage Officer ;

(d) "section" means a section of the Act.

3. **Particulars regarding name, etc., of Marriage Officer to be displayed in his office building.**—Every Marriage Officer shall arrange to have his name, designation and the working hours of his office to be written in English, Hindi and the language of the country, place or area in which he functions as such, and displayed in a conspicuous part of the building in which his office is situated.

4. **Notice of intended marriage.**—(1) When a marriage is intended to be solemnized under the Act by or before a Marriage Officer, the parties to the intended marriage shall give notice thereof in writing in the form specified in the First Schedule to the Act to such Officer either in person or by registered post.

(2) The notice shall be accompanied by a statement containing the following particulars :

(i) Present addresses of the parents of the parties to the intended marriage.

(ii) Name or names of the country or countries in which the parties are ordinarily resident.

(iii) State or States in India to which the parties or, as the case may be, the Indian party, to the marriage belong or belongs.

---

1. Vide Noti. No. G. S. R. 1274, dated August 19, 1970, published in Gazette of India, Pt. II, Section 3 (i), dated 5th September, 1970, pp. 3101-3105.

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5. Payment of fee.—(1) Where the notice is delivered in person, the fee prescribed therefor in Rule 15 shall be paid in cash to the Marriage Officer.

(2) Where the notice is sent by registered post, the fee shall be remitted by money order at there mitter's expense and the receipt issud to the remitter by the post office through which the remittance is made shall be attached to the notice.

6. Procedure after notice.- (1) As soon as the notice is received by the Marriage Officer, a distinctive serial number shall be entered on it and such number and the date of receipt of the notice shall be attested by the signature of the Marriage Officer.

(2) If the notice is in conformity with the requirements of the Act, it shall be entered in the Marriage Notice Book which shall be bound volume, the pages of which are machine numbered consecutively with a nominal index attached.

(3) If the notice is not in conformity with the requirements of the Act, it shall be got rectified by the parties if they are present, or returned to them by post for rectification and retransmission within a date to be fixed for this purpose, if they are not present.

(4) The Marriage Officer shall have every item of rectification attested by both the parties.

7. Publication of notice.—The Marriage Officer shall cause the notice to be published :—

(a) by affixing a true copy thereof under his seal and signature to some conspicuous place in his office ;

(b) by forwarding true copies thereof under his seal and signature to the parents of the parties to the marriage ; and

(c) by publishing it in a newspaper having circulation,—

(i) in the State or States in India to which the parties or, as the case may be, the Indian party, to the marriage belong or belongs ; and

(ii) in the country or countries in which the parties are ordinarily resident.

8. Procedure for inquiry into objection.- (1) If any objection to the solemnization of the intended marriage (together with the fee prescribed therefor in Rule 15) is received by the Marriage Officer, he shall record the nature of the objection in his Marriage Notice Book and fix the date and time for inquiry into the objection and cause notice thereof to be given in Form I to the person who has made the objection and also the parties to the intended marriage.

(2) On the date so fixed or on any other date to which the inquiry may be adjourned, the Marriage Officer shall make an inquiry into the objection and record in his own hand in the manner prescribed in the Code of Civil Procedure, 1908 (5 of 1908), the evidence given.

9. Time and place of solemnisation.— The intended marriage may be solemnized at any time during office hours of the Marriage Officer or at any other time convenient to him—

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(a) at the official house of residence of the Marriage Officer, or

(b) at the office in which the business of the Marriage Officer is transacted, or

(c) at such other place within a reasonable distance from such official house or office as the Marriage Officer may in his discretion approve :

Provided that additional fees as specified in Rule 15 shall be payable for the solemnization of any marriage at a place referred to in clause (c).

10. Manner of registration of marriages.—Registration of a marriage under Section 17 shall be effected by the Marriage Officer by entering a certificate of the marriage in Form II in the Marriage Certificate Book.

11. Appeals to the Central Government.—An appeal to the Central Government under sub-section (3) of Section 11 or sub-section (4) of Section 17 shall be in the form of a memorandum which shall be accompanied by a certified copy of :

(i) the notice of the intended marriage or, as the case may be, of the application for registration of the marriage ;

(ii) the statement of the reasons for which the Marriage Officer refused to solemnize or, as the case may be, register the marriage.

12. Language for purposes of Section 24.—The language for purposes of sub-clause (ii) of clause (b) of sub-section (1) of Section 24 shall be English, Hindi or any other language approved by the Marriage Officer.

13. Transmission of copies of entries in marriage records. - The Marriage Officer shall send to the Secretary to the Government of India, Ministry of External Affairs, New Delhi, three true copies certified in Form III of all entries or corrections made by him in the Marriage Certificate Book at intervals of three months on, or as early as possible after, the Ist day of January, April, July and October in each year and one such copy shall be transmitted by the said Secretary to the Registrar-General or to each of the Registrars-General of Births, Deaths and Marriages of the State or States in India to which the parties to the marriage belong.

14. Form of Marriage Certificate Book.—(1) The Marriage Certificate Book shall be a bound volume, the pages of which are machine numbered consecutively with a nominal index attached. Every marriage certificate entered therein during each calendar year shall be consecutively numbered and every authenticated copy of a certificate issued to the parties shall bear the number and date, month and year in which the certificate was entered.

(2) For the removal of doubts it is hereby provided that the Marriage Certificate Book maintained under the Special Marriage (Diplomatic and Consular Officer) Rules, 1955, may be continued to be used with necessary adaptations as the Marriage Certificate Book for the purposes of these rules and the Act.

15. Scale of fees.—(1) The following fees shall be levied by Marriage Officers :—

(i) For every notice of intended marriage, Rs. 39.50 (to be paid by the parties to the marriage).

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5. **Payment of fee.**—(1) Where the notice is delivered in person, the fee prescribed therefor in Rule 15 shall be paid in cash to the Marriage Officer.

(2) Where the notice is sent by registered post, the fee shall be remitted by money order at there mitter's expense and the receipt issud to the remitter by the post office through which the remittance is made shall be attached to the notice.

6. **Procedure after notice.**- (1) As soon as the notice is received by the Marriage Officer, a distinctive serial number shall be entered on it and such number and the date of receipt of the notice shall be attested by the signature of the Marriage Officer.

(2) If the notice is in conformity with the requirements of the Act, it shall be entered in the Marriage Notice Book which shall be bound volume, the pages of which are machine numbered consecutively with a nominal index attached.

(3) If the notice is not in conformity with the requirements of the Act, it shall be got rectified by the parties if they are present, or returned to them by post for rectification and retransmission within a date to be fixed for this purpose, if they are not present.

(4) The Marriage Officer shall have every item of rectification attested by both the parties.

7. **Publication of notice.**—The Marriage Officer shall cause the notice to be published :—

(a) by affixing a true copy thereof under his seal and signature to some conspicuous place in his office ;

(b) by forwarding true copies thereof under his seal and signature to the parents of the parties to the marriage ; and

(c) by publishing it in a newspaper having circulation,—

(i) in the State or States in India to which the parties or, as the case may be, the Indian party, to the marriage belong or belongs ; and

(ii) in the country or countries in which the parties are ordinarily resident.

8. **Procedure for inquiry into objection.**- (1) If any objection to the solemnization of the intended marriage (together with the fee prescribed therefor in Rule 15) is received by the Marriage Officer, he shall record the nature of the objection in his Marriage Notice Book and fix the date and time for inquiry into the objection and cause notice thereof to be given in Form I to the person who has made the objection and also the parties to the intended marriage.

(2) On the date so fixed or on any other date to which the inquiry may be adjourned, the Marriage Officer shall make an inquiry into the objection and record in his own hand in the manner prescribed in the Code of Civil Procedure, 1908 (5 of 1908), the evidence given.

9. **Time and place of solemnisation.**— The intended marriage may be solemnized at any time during office hours of the Marriage Officer or at any other time convenient to him—

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(a) at the official house of residence of the Marriage Officer, or

(b) at the office in which the business of the Marriage Officer is transacted, or

(c) at such other place within a reasonable distance from such official house or office as the Marriage Officer may in his discretion approve :

Provided that additional fees as specified in Rule 15 shall be payable for the solemnization of any marriage at a place referred to in clause (c).

10. Manner of registration of marriages.—Registration of a marriage under Section 17 shall be effected by the Marriage Officer by entering a certificate of the marriage in Form II in the Marriage Certificate Book.

11. Appeals to the Central Government.—An appeal to the Central Government under sub-section (3) of Section 11 or sub-section (4) of Section 17 shall be in the form of a memorandum which shall be accompanied by a certified copy of :

(i) the notice of the intended marriage or, as the case may be, of the application for registration of the marriage ;

(ii) the statement of the reasons for which the Marriage Officer refused to solemnize or, as the case may be, register the marriage.

12. Language for purposes of Section 24.—The language for purposes of sub-clause (ii) of clause (b) of sub-section (1) of Section 24 shall be English, Hindi or any other language approved by the Marriage Officer.

13. Transmission of copies of entries in marriage records. - The Marriage Officer shall send to the Secretary to the Government of India, Ministry of External Affairs, New Delhi, three true copies certified in Form III of all entries or corrections made by him in the Marriage Certificate Book at intervals of three months on, or as early as possible after, the Ist day of January, April, July and October in each year and one such copy shall be transmitted by the said Secretary to the Registrar-General or to each of the Registrars-General of Births, Deaths and Marriages of the State or States in India to which the parties to the marriage belong.

14. Form of Marriage Certificate Book.—(1) The Marriage Certificate Book shall be a bound volume, the pages of which are machine numbered consecutively with a nominal index attached. Every marriage certificate entered therein during each calendar year shall be consecutively numbered and every authenticated copy of a certificate issued to the parties shall bear the number and date, month and year in which the certificate was entered.

(2) For the removal of doubts it is hereby provided that the Marriage Certificate Book maintained under the Special Marriage (Diplomatic and Consular Officer) Rules, 1955, may be continued to be used with necessary adaptations as the Marriage Certificate Book for the purposes of these rules and the Act.

15. Scale of fees.—(1) The following fees shall be levied by Marriage Officers :—

(i) For every notice of intended marriage, Rs. 39.50 (to be paid by the parties to the marriage).

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(ii) For recording an objection, Rs. 15.75 (to be paid by the person making the objection).

(iii) For every inquiry into an objection, Rs. 78.75 (to be paid by the person making the objection).

(iv) For every notice to the parties to an intended marriage, of the date and time fixed for inquiry into an objection, Rs. 3.25 (to be paid by the person making the objection).

(v) For solemnizing a marriage, Rs. 78.75 (to be paid by the parties to the marriage).

(vi) For solemnizing a marriage at a place referred to in Rule 9 (c) (to be paid by the parties to the marriage), Rs. 31.50 in addition to the fee of Rs. 78.75 referred to in item (v) above.

(vii) For registration by Consular Officer of a marriage solemnized in accordance with the local laws (in addition to the fee for attendance), Rs. 78.75 (to be paid by the party desiring registration).

(viii) For receiving notice of a cave at Rs, 78.75.

(ix) For certificate by Marriage Officer of notice having been given and posted up, Rs. 15.75.

(x) For a certified copy of reasons recorded under Section 11 or Section 17 for refusal to solemnise or, as the case may be, for refusal to register, a marriage, Rs. 8.00 (to be paid by the applicant).

(xi) For certified copy of an entry (to be paid by the applicant)—

(a) in the Marriage Notice Book, Rs. 8.00, or

(b) in the Marriage Certificate Book, Rs. 8.00.

(xii) For certification of a document referred to in sub-section (1) of Section 24, Rs. 3.25.

(xiii) For making a search (to be paid by the applicant)—

(a) if the entry is of the current year, Rs. 8.00, or

(b) if the entry relates to any previous year or years, Rs. 15.75.

(2) A receipt duly signed by the Marriage Officer shall be issued for all fees received by him under the Act and these rules. The receipt books shall be bound volumes of one hundred leaves each with foils and counterfoils which shall be machine-numbered consecutively. All moneys received by the Marriage Officer shall be credited to such head of account as the Central Government may specify in this behalf.

FORM I

[*See* Rule 8 (1)]

Notice

Before the Marriage Officer.....Place

In the matter of the Foreign Marriage Act, 1969 (33 of 1969)

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and

In the matter of the intended marriage between

AB

and (Give names and addresses)

CD

EF Person making the objection.

To

.....

Whereas notice of an intended marriage between AB and CD was received by the Marriage Officer.....;

And whereas EF has preferred certain objections (set out overleaf) to the solemnization of the marriage ;

And whereas the Marriage Officer will hold an inquiry into the matter of the said objections on the.....day of .....,19.....at this office ;

You are hereby required to be present at.....a.m./p.m. on the said day together with all documents on which you rely and witnesses whom you may desire to be examined on your behalf.

Take notice that in default of your appearance at the time specified above on the aforesaid day the inquiry will be made, and the matter aforesaid decided, in your absence.

Given under my hand and seal

Station ;

Date :

(Set out the objection on the reverse of this notice).

Signature

Marriage Officer.

Seal

FORM II

[*See* Rule 10]

Certificate of Registration of Marriage

I, EF, hereby certify that AB and CD* informed me in writing that he/she desires his/her marriage*

———————————————to be registered under Section 17 of the they desire their marriage

Foreign Marriage Act, 1969 (33 of 1969) and that each of the parties to the said marriage, in my presence and in the presence of three witnesses who have signed hereunder, have declared that a ceremony of marriage has been performed between them and that they have been living together as

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husband and wife since the time of marriage, and the said marriage has this day of.....19.....been registered under this Act.

(Sd.) EF

Marriage Officer for.....

(Sd.) A B (Husband).

(Sd.) C D (Wife).

(Sd.) G H
(Sd.) O S } Three witnesses.
(Sd.) K L

Dated the.....day of.....,19.. .....

---

*Strike out whatever is inapplicable.

FORM III

[*See* Rule 13]

Form of Certificate

Certified that the above entries from the Marriage Certificate Book in this office bearing serial number.....are true copies of all the entries and corrections in the Marriage Certificate Book kept by me during the three months ending .....

(Sd.)

Marriage Officer.

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APPENDIX XII

THE INDIAN DIVORCE ACT, 1869[1]

(4 of 1869)

[26th February, 1869]

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An Act to amend the law relating to Divorce and Matrimonial Causes[1]

Preamble—Whereas it is expedient to amend the law relating to the divorce of persons professing the Christian religion, and to confer upon certain courts jurisdiction in matters matrimonial; It is hereby enacted as follows :—

I—PRELIMINARY

1. Short title, commencement of Act.—This Act may be called the Indian Divorce Act, and shall come into operation on the first day of April, 1869.

2. Extent of Act.—[2][This Act extends to [3][the whole of India [4][except the State of Jammu and Kashmir].

Extent of power to grant relief generally.—[5][Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except where the petitioner [6][or respondent] professes the Christian religion.

and to make decrees of dissolution—or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented,

or of nullity.—or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition,

or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.]

3. Interpretation clause.—In this Act, unless there be something repugnant in the subject or context,—

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1. The words "in India" omitted by Act 3 of 1951, Section 3 and Schedule.
2. Subs. by A.O. 1948, for the original first paragraph.
3. Subs. by A.O. 1950, for certain words.
4. Subs. by Act 3 of 1951, Section 3 and Sch., for "except Part B States".
5. Subs. by Act 25 of 1926, Section 2 for paragraphs 2, 3 and 4.
6. Ins. by Act 30 of 1927, Section 2.

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[1][(1) "*High Court*"—"High Court" means with reference to any area—

(a) in a State, the High Court for that State ;

[2][(b) in Delhi, the High Court of Delhi ;

(bb) in Himachal Pradesh, the High Court of Punjab & Haryana up to and inclusive of the 30th April, 1967 and the High Court of Delhi thereafter ;

(c) in Manipur and Tripura, the High Court of Assam ;

(d) in the Andaman and Nicobar Islands, the High Court at Calcutta ;

(e) in the Laccadive, Minicoy and Amindivi Islands, the High Court of Kerala ;

[3][(ee) in Chandigarh, the High Court of Punjab and Haryana ;]

and in the case of any petition under this Act, "High Court" means the High Court for the area where the husband and wife reside or last re·ided together]:

[4][(2) "*District Judge*"—"District Judge" means a Judge of a principal civil court of original jurisdiction however designated :]

(3) "*District Court*"—"District Court" meas, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction, or of whose jurisdiction under this Act, the husband and wife reside or last resided together :

(4) "*Court*".—"Court" means the High Court or the District Court, as the case may be :

(5) "*Minor children*".—"Minor Children" means, in the case of sons of Native fathers, boys who have not completed the age of sixteen years, and, in the case of daughters of Native fathers, girls who have not completed the age of thirteen years :

In other cases it means unmarried children who have not completed the age of eighteen years :

(6) *Incestuous adultery*".—"Incestuous adultery" means adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity :

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1. Subs. by A.O. (No. 2) 1956, for the former clause.
2. Subs. by the Himachal Pradesh (Adaptation of Laws on State and Concurrent Subjects) Order, 1968, for sub-clause (b) (w. e. f. 1-11-1966).
3. Ins. by the Punjab Reorganisation (Chand garh) Adaptation of Laws on State and Concurrent Subjects) Order, 1968 (w.e.f. 1-11-1966).
4. Subs. by A. O. 1950, for the former clause.

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(7) "*Bigamy with adultery*".– bigamy with adultery" means adultery with the same woman with whom the bigamy was committed ;

(8) "*Marriage with another woman*"—"marriage with another woman" means marriage of any person, being married, to any other person, during the life of the former wife, whether the second marriage shall have taken place within [1][India] or elsewhere ;

(9) "*Desertion.*—"desertion" implies an abandonment against the wish of the person charging it : and

(10) "*Property*" —"property" includes in the case of a wife any property to which she is entitled for an estate in remainder or reversion or as a trustee, executrix or administratrix ; and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or adminitratrix.

II—JURISDICTION

4. Matrimonial jurisdiction of High Courts to be exercised subject to Act. Exception.—The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et toro*, and in all other causes, suits and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained, and not otherwise : except so far as relates to the granting of marriage-licenses, which may be granted as if this Act had not been passed.

5. Enforcement of decrees or orders made heretofore by Supreme or High Court.—Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

6. Pending suits.—All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

7. Court to act on principles of English Divorce Court.—Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief :

[2][Provided that nothing in this section shall deprive the said Courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded].

8. Extraordinary jurisdiction of High Court.—The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

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1. Subs. by A. O. 1950, for "the dominions of Her Majesty".
2. Added by Act 10 of 1912, Section 2.

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Power to transfer suits.—The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

9. Reference to High Court.—When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon.

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference, and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

III—DISSOLUTION OF MARRIAGE

10. When husband may petition for dissolution.—Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.

When wife may petition for dissolution.—Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman ;

or has been guilty of incestuous adultery,

or of bigamy with adultery,

or of marriage with another woman with adultery,

or of rape, sodomy or bestiality,

or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*,

or of adultery coupled with desertion, without reasonable excuse, for two years or upwards.

Contents of petition.—Every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded.

STATE AMENDMENT

UTTAR PRADESH.—In Section 10, the words "or to the High Court" wherever occurring in the section, shall be omitted - U. P. Act XXX of 1957, Section 2 and Schedule.

11. Adulterer to be co-respondent.—Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court—

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(1) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed ;

(2) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it ;

(3) that the alleged adulterer is dead.

12. Court to be satisfied of absence of collusion.—Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, or has condoned the same, and shall also enquire into any countercharge which may be made against the petitioner.

13. Dismissal of petition.—In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition.

When a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court.

STATE AMENDMENT

UTTAR PRADESH.—In Section 13, the last paragraph, namely, "when a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court" shall be omitted— U. P. Act XXX of 1957, Section 2 and Schedule.

14. Power to Court to pronounce decree for dissolving marriage.—In case the Court is satisfied on the evidence that the case of the petitioner has been proved,

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections sixteen and seventeen made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has, during the marriage, been guilty of adultery,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay in presenting or prosecuting such petition,

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or of cruelty towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect or misconduct of or towards the other party as has conduced to the adultery.

Condonation.—No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal cohabitation has been resumed or continued.

15. Relief in case of opposition on certain grounds.—In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or, in case of such suit instituted by a wife, on the ground of her adultery and cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion.

16. Decrees for dissolution to be nisi.—Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court, shall, in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court, by general or special order from time to time, directs.

Collusion.—During that period any person shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not being brought before the Court.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may demand.

The High Court may order the costs of Counsel and witnesses and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.

Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

STATE AMENDMENT

UTTAR PRADESH.—In Section 16—

(1) In the first paragraph the words "made by a High Court, not being a confirmation of a decree of a District Court" and "or special" shall be omitted.

(2) In the second paragraph the words "or special" occurring between the words "General" and "Order", shall be omitted.

(3) In the fourth and fifth paragraphs for the words "High Court", the word "Court" shall be substituted—U. P. Act XXX of 1957, Section 2 and Schedule.

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17. Confirmation of decree for dissolution by District Judge.—Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by a Court composed of such two Judges, and in case of difference the opinion of the Senior Judge shall prevail.

The High Court, if it thinks further enquiry or additional evidence to be necessary, may direct such enquiry to be made, or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon, make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit ;

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

During the progress of the suit in the Court of the District Judge, any person suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs,to apply to the High Court to remove the suit under section eight, and theHigh Court shall thereupon, if it thinks fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section sixteen shall apply to every suit so removed : or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case.

STATE AMENDMENT

UTTAR PRADESH.—In Section 17—

(1) Paragraph one to five shall be omitted.

(2) In paragraph six the words "or special" occurring between the words "general" and "order", shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

[1][**17-A. Appointment of officer to exercise duties of King's Proctor.**—[2][The Government of the State within which any High Court exercises jurisdictional], may appoint an officer who shall, within the jurisdiction of the High Court in that State, have the like right of showing cause why a decree for the dissolution of a marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor ; and the said Government may make rules regulating the manner in which the right shall be exercised and all matters incidental to or consequential on any exercise of the right.

[3]* * * * *

1. Subs. by A. O. 1937, for the original Section 17-A.
2. Subs. by Act 3 of 1951, Section 3 and Schedule for certain words.
3. Second paragraph omitted by Section 3, ibid.

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IV—NULLITY OF MARRIAGE

18. Petition for decree of nullity.—Any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void.

STATE AMENDMENT

UTTAR PRADESH.—In Section 18, for the words "District or to the High Court", the words "District Court" shall be substituted—U. P. Act XXX of 1957, Section 2 and Schedule.

19. Grounds of decree.—Such decree may be made on any of the following grounds :—

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit ;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity ;

(3) that either party was a lunatic or idiot at the time of the marriage ;

(4) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.

STATE AMENDMENT

UTTAR PRADESH.—In Section 19, in the last paragraph for the words "High Court" the word "Court" shall be substituted—U. P. Act XXX of 1957, Section 2 and Schedule.

20. Confirmation of District Judge's decree.—Every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section seventeen, clauses one, two, three and four, shall, *mutatis mutandis* apply to such decrees.

STATE AMENDMENT

UTTAR PRADESH.—Section 20 shall be deleted—U. P. Act XXX of 1957, Section 2 and Schedule.

21. Children of annulled marriage.—Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

V—JUDICIAL SEPARATION

22. Bar to decree for divorce a mensa et toro ; but judicial separation obtainable by husband or wife. - No decree shall hereafter be made for a divorce a *mensa et toro*, but the husband or wife may obtain a decree of

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judicial separation, on the ground of adultery, or cruelty, or desertion without reasonable excuse for two years or upwards, and such decree shall have the effect of a divorce a *mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

23. Application for separation made by petition.—Application for judicial separation on any one of the grounds aforesaid, may be made by either husband or wife by petition to the District Court or the High Court; and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

STATE AMENDMENT

UTTAR PRADESH.—In Section 23, the words "or the High Court" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

24. Separated wife deemed spinster with respect to after-acquired property.—In every case of a judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her.

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead :

Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

25. Separated wife deemed spinster for purposes of contract and suing.—In every case of a judicial separation under this Act, the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding ; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation :

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use :

Provided also that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband.

Reversal of decree of separation

26. Decree of separation obtained during absence of husband or wife may be reversed.—Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

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The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

VI—PROTECTION ORDERS

27. Deserted wife may apply to Court for protection.—Any wife to whom Section 4 of the Indian Succession Act, 1865[1] (10 of 1865), does not apply, may, when deserted by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

STATE AMENDMENT

UTTAR PRADESH. In Section 27, the words "or the High Court" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

28. Court may grant protection order.—The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

29. Discharge or variation of orders.—The husband or any creditor of, or person claiming under him, may apply to the Court by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it thinks fit so to do, may discharge or vary the order accordingly.

30. Liability of husband seizing wife's property after notice of order.—If the husband, or any creditor of, or person claiming under, the husband, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to return or deliver to her the specific property, and also to pay her a sum equal to double its value.

31. Wife's legal position during continuance of order.—So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

VII—RESTITUTION OF CONJUGAL RIGHTS

32. Petition for restitution of conjugal rights. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition,

1. See now the Indian Succession Act, 1925 (39 of 1925).

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and that there is no legal ground why the application should not be granted, may decree restitution of conjugal right accordingly.

STATE AMENDMENT

UTTAR PRADESH.—In Section 32, the words "or the High Court" shall be omitted—U.P. Act XXX of 1957, Section 2 and Sch.

33. Answer to petition.—Nothing shall be pleaded in answer to a petition for restitution of conjugal rights, which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.

VIII—DAMAGES AND COSTS

34. Husband may claim damages from adulterer.—Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition to the District Court or the High Court limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife, unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear.

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

STATE AMENDMENT

UTTAR PRADESH.– In Section 34, the words "or the High Court" shall be omitted– U.P. Act XXX of 1957, Section 2 and Sch.

35. Power to order adulterer to pay costs.—Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings;

Provided that the co-respondent shall not be ordered to pay the petitioner's costs—

(1) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not, at the time of the adultery, reason to believe the respondent to be a married woman.

Power to order litigious intervenor to pay costs.—Whenever any application is made under Section 17, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

IX—ALIMONY

36. Alimony pendente lite.—In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an

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order of protection, the wife may present a petition for alimony pending the suit.

Such petition shall be served on the husband ; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just :

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

37. Power to order permanent alimony.—The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife.

order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

Power to order monthly or weekly payments.—In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable :

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

STATE AMENDMENT

UTTAR PRADESH.—In Section 37—

(1) For the words "High Court" the word "Court" shall be substituted.

(2) The second paragraph namely, "and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, "shall be omitted.—U.P. Act XXX of 1957, Section 2 and Sch.

38. Court may direct payment of alimony to wife or to her trustee.—In all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do,

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X—SETTLEMENTS

39. Power to order settlement of wife's property for benefit of husband and children. Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it thinks fit, order such settlement as it thinks reasonable to be made of such property or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation, shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

Settlement of damages.—The Court may direct that the whole or any part of the demages recovered under section thirty-four shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

40. Inquiry into existence of ante-nuptial or post-nuptial settlements.—The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree and may make such orders, with reference to the application of the whole or a portion of the property settled, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit:

Provided that the Court shall not make any order for the benefit of the parents or either of them at the expense of the children.

STATE AMENDMENT

UTTAR PRADESH—In Section 40—

(1) For the words "High Court" the word "Court" shall be substituted.

(2) The second paragraph, namely "and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed," shall be omitted—U.P. Act XXX of 1957 Section 2 and Sch.

XI—CUSTODY OF CHILDREN

41. Power to make orders as to custody of children in suit for separation.—In any suit for obtaining a judicial separation the Court may from time to time before making its decree, make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of such suit, and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the said Court,

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42. Power to make such orders after decree.—The Court, after a decree of judicial separation, may upon application (by petition) for this purpose make, from time to time, all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

43. Power to make orders as to custody of children in suits for dissolution or nullity.—In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to, a High Court, the Court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree,

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation.

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit,

and may, if it thinks fit, direct proceedings to be taken for placing such children under the protection of the Court.

STATE AMENDMENT

UTTAR PRADESH—In Section 43—

(1) In the first paragraph the words "instituted in, or removed to a High Court" shall be omitted.

(2) The second paragraph shall be omitted.

(3) In the third paragraph for the words "High Court or District Court (as the case may be)" the words "Court" shall be substituted —U. P. Act XXX of 1957, Section 2 and Schedule.

44. Power to make such orders after decree or confirmation.—The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provision, with respect to the custody, maintenance and education of the minor children, and marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

STATE AMENDMENT

UTTAR PRADESH.—In Section 44—

(1) In the first paragraph for the words "High Court", the word "Court" shall be substituted.

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(2) The second paragraph, i. e. the words "and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed" shall be omitted– U. P. Act XXX of 1957, Section 2 and Sch.

XII—PROCEDURE

45. Code of Civil Procedure to apply.—Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.[1]

46. Forms of petitions and statements.—The forms set forth in the schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such Schedule.

47. Petition to state absence of collusion.—Every petition under this Act for a decree of dissolution of marriage, or of nullity of marriage, or of judicial separation [2]* * shall [3]* * state that there is not any collusion or connivance between the petitioner and the other party to the marriage.

Statements to be verified.—The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of palints, and may at the hearing be referred to as evidence.

48. Suits on behalf of lunatics.—When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

49. Suits by minors.—Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking [4] * * shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit.

50. Service of petition.—Every petition under this Act shall be served on the party to be affected thereby, either within or without [5][India], in such manner as the High Court by general or special order from time to time directs;

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1. See now the Code of Civil Procedure, 1908 (5 of 1908).
2. The words "or of reversal of judicial separation, or for restitution of conjugal rights, or for damages, shall bear a stamp of five rupees, and" rep. by Act 7 of 1870.
3. The words "in the first, second and third cases mentioned in this section" rep. by *ibid*.
4. The words "shall bear a stamp of eight annas and" rep., ibid.
5. Subs. by A. O. 1950, for "the Provinces" which had been subs. by A. O. 1948, for "British India".

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Provided that the Court may dispense with such service altogether in case it deems necessary or expedient so to do.

STATE AMENDMENT

UTTAR PRADESH—In Section 50, for the words "High Court by general or special order from time to time directs", the words "Court may direct" shall be substituted—U. P. Act XXX of 1957, Section 2 and Schedule.

51. Mode of taking evidence.—The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness :

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite-party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

52. Competence of husband and wife to give evidence as to cruelty or desertion.—On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

53. Power to close doors.—The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

54. Power to adjourn.—The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

55. Enforcement of, and appeal from, orders and decrees. - All decrees and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from, in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from, under the laws, rules and orders for the time being in force :

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage ; nor from the order of the High Court confirming or refusing to confirm such decree :

No appeal as to costs.—Provided also that there shall be no appeal on the subject of costs only.

STATE AMENDMENT

UTTAR PRADESH.—In Section 55—

(1) The first proviso shall be omitted.

(2) In the second proviso, the word "also" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

56. Appeal to the Supreme Court.—Any person may appeal to [1][the Supreme Court] from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

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1. Subs. by A. O. 1950, for "Her Majesty in Council".

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and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court.

when the High Court declares that the case is a fit one for appeal to [1][the Supreme Court].

XIII—RE-MARRIAGE

57. Liberty to parties to marry again.—When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

Provided that no appeal to [1][the Supreme Court] has been presented against any such order or decree.

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

STATE AMENDMENT

UTTAR PRADESH.—In Section 57, for the existing section, the following shall be substituted :

"57. *Liberties to parties to marry again.*—When six months after the date of any decree absolute dissolving a marriage have expired, and no appeal has been presented against such decree,

or when any such appeal has been dismissed, or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death."—U. P. Act XXX of 1957, Section 2 and Schedule.

58. English clergyman not compelled to solemnize marriages of persons divorced for adultery.—No clergyman in Holy Orders of the [2][* * *] Church of England [3][* * *] shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

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1. Subs. by A. O 1950, for "Her Majesty in Council".
2. The word "United" rep. by Act 12 of 1873, Section 1 and Schedule.
3. The words "and Ireland" rep. by Section 1 and Schedule ibid.

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59. English Minister refusing to perform ceremony to permit use of his Church. –When any Minister of any Church or Chapel of the said Church refuses to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such Church or Chapel, such Minister shall permit any other Minister in Holy Orders of the said Church, entitled to officiate within the diocese in which such Church or Chapel is situate, to perform such marriage service in such Church or Chapel.

XIV MISCELLANEOUS

60. Decree for separation or protection-order valid as to persons dealing with wife before reversal.—Every Decree for judicial separation or order to protect property, obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order, and of the reversal, discharge or variation thereof.

Indemnity of persons making payment to wife without notice of reversal of decree or protection order.—All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued.

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

61. Bar of suit for criminal conversation.– After this Act comes into operation, no person competent to present a petition under sections two and ten shall maintain a suit for criminal conversation with his wife.

62 Power to make rules.—The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same :

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.[1]

All such rules, alterations and additions shall be published in the official Gazette.

SCHEDULE OF FORMS

No. 1—*Petition by husband for a dissolution of marriage with damages against co-respondent, by reason of adultery.*

(*See* Sections 10 and 34)

In the (High) Court of

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1. *See* now the Code of Civil Procedure, 1908 (5 of 1908).

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To the Hon'ble Mr. Justice.....(or to the Judge of.....)

The.....day of.....186 .

The petition of A.B. of

SHEWETH,

1. That your petitioner was on the.....day of..... one thousand eight hundred and lawfully married to C.B., then C. D., spinster at (a).

2. That from his said marriage, your petitioner lived and cohabited with his said wife at.....and at....., in.....and lastly at....., in....., and that your petitioner and his said wife have had issue of their said marriage, five children, of whom two sons only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the..... day of.....one thousand eight hundred and.....X.Y. was constantly with a few exceptions, residing in the house of your petitioner at..... aforesaid, and that on diverse occasions during the said period, the dates of which are unknown to your petitioner, the said C.B. in your petitioner's said house committed adultery with the said X.Y.

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage, and that the said X.Y. do pay the sum of Rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit.

(Signed) A.B. (b).

Form of Verification,

I, A.B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

STATE AMENDMENT

UTTAR PRADESH.—In Form 1—

(i) the word and the brackets "(High)" and "(or to the Judge of)" and the words "To the Hon'ble Mr. Justice" shall be omitted.

(ii) the word and brackets "(Hon'ble)" wherever occurring, shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 2—*Respondent's statement in answer to No.* 1

In the Court of.....the.....day of.....

Between A.B., petitioner.

C.B., respondent, and

X.Y., co-respondent.

C.B, the respondent, by D.E. her attorney (or vakil, in answer to the petition of A.B. says that she denies that she has on diverse or any occasions

(a) If the marriage was solemnized out of India, the adultery must be shown to have been committed in India.

(b)—The petition must be signed by the petitioner.

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committed adultery with X.Y., as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon'ble) Court will reject the said petition.

(Signed) C.B.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 2, the word and the brackets "(Hon'ble)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 3—*Co-respondent's statement in answer to No.* 1.

In the (High) Court of

The.....day of..... .....

Between A.B., petitioner,

C.B., respondent, and

X.Y., co-respondent.

X.Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said C.B. as alleged in the said petition.

Wherefore the said X.Y. prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition.

(Signed) X.Y.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 3, the words and brackets "(High)" and "(Hon'ble)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 4—*Petition for Decree of Nullity of Marriage*

(*See* Section 18)

In the (High) Court of.....

To the Hon'ble Mr. Justice.....(or to the Judge of.....)

The.....day of....., 186 .

The petition of A.B. falsely called A.D.,

SHEWETH,

1. That on the..... day of....., one thousand eight hundred and....., your petitioner, then a spinster, eighteen years of age, was married in fact, though not in law, to C. D., then a bachelor of about thirty years of age, at (some place in India).

2. That from the said.....day of....., one thousand eight hundred and ....., until the month of....., one thousand eight hundred and....., your petitioner lived and cohabited with the said C.D., at divers places, and particularly at.....aforesaid,

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3. That the said C.D. has never consummated the said pretended marriage by carnal copulation.

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C.D. was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said C.D. with respect to the subject of this suit.

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) A.B.

Form of Verification.—*See* No. 1.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 4, the words and the brackets "(High)", (or to the Judge of)" and "(Hon'ble)" and the words "To the Hon'ble Mr. Justice" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 5—*Petition by wife for judicial separation on the ground of her husband's adultery*

(*See* Section 22)

In the (High) Court of

To the Hon'ble Mr. Justice

To the Judge of). (or

The.....day of.....186 .

The petition of C B. of.....the wife of A.B.

SHEWETH,

1. That on the.....eight hundred and sixty....., day of ....., one thousand married to A.B., at the Church of.....your petitioner, then C.D., was lawfully..... , in the.....

2. That after her said marriage, your petitioner cohabited with the said A B. at.....and at, and that your petitioner and her said husband have issue living of their said marriage, three children, to wit etc., etc. (a).

3. That on divers occasions in or about the months of August, September and October, one thousand eight hundred and sixty..... ..., the said A B., at.....aforesaid, committed adultery with E.F. who was then living in the service of the said A B. and your petitioner at their said residence.....aforesaid.

4. That on divers occasions in the months of October, November and December, one thousand eight hundred and sixty....., the said A.B. at.....aforesaid, committed adultery with G.H., who was then living in the service of the said A.B. and your petitioner at their said residence..... aforesaid

5. That no collusion or connivance exists between your petitioner and the said A.B. with respect to the subject of the present suit.

(a)—State the respective ages of the children.

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Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed) C.B. (b)

Form of Verification ; *See* No. 1.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 5, the words and the brackets "(High)", "(or to the Judge of)" and "(Hon'ble) and the words "To the Hon'ble Justice" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 6—*Statement in answer to* No. 5.

In the (High) Court of

B. against B.

The.....day of.....

The respondent, A.B. by W.Y., his attorney (or vakil) saith,—

(1) That he denies that he committed adultery with E.F. as in the third paragraph of the petition alleged.

(2) That the petitioner condoned the said adultery with E.F., if any.

(3) That he denies that he committed adultery with G.H., as in the fourth paragraph of the petition alleged.

(4) That the petitioner condoned the said adultery with G.H., if any.

Wherefore this respondent prays that this (Hon'ble Court will reject the prayer of the said petition.

(Signed) A.B.

STATE AMENDMENT

UTTAR PRADEDH.—In Form No. 6, the words and the brackets "(High)" and "(Hon'ble)" shall be omitted,—U. P. Act, XXX of 1957, Section 2 and Schedule.

No. 7—*Statement in reply to No.* 6

In the (High) Court of

B. against B.

The day of

The petitioner, C. B., by her attorney (or vakil), says—

(1) That she denies that she condoned the said adultery of the respondent with E. F. as in the second paragraph of the statement in answer alleged.

(2) That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with G. H., as set forth in the fourth paragraph of the petition.

(Signed) C. B.

(b)—The petition must be signed by the petitioner.

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STATE AMENDMENT

UTTAR PRADESH.—In Form No. 7, the word and the brackets "(High)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 8—*Petition for a judicial separation by reason of cruelty*
(*See* Section 22)

In the (High) Court of

To the Hon'ble Mr. Justice (or To the Judge of)

The day of 186 ,

The petition of A. B. (wife of C. B.) of

SHEWETH,

1. That on the day of ,one thousand eight hundred and , your petitioner, then A.D., spinster, was lawfully married to C. B., at

2. That from her said marriage, your petitioner lived and cohabited with her said husband at until the day of one thousand eight hundred and , when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage, the said C. B. habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of one thousand eight hundred and , the said C. B. in the highway and opposite to the house in which your petitioner and the said C. B. were then residing at aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of F. D., your petitioner's brother.

5. That subsequently on the same evening, the said C. B. in his said house at aforesaid, struck your petitioner with his clenched fists a violent blow on her face.

6. That on one Friday night in the month of one thousand eight hundred and , the said C. B., in without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the day of , one thousand eight hundred and , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at , that from and after the said day of , one thousand eight hundred and , your petitioner hath lived separate and apart from her said husband, and hath never returned to his house or to cohabitation with him.

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8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said C. B., and also order that the said C. B. do pay the costs of and incident to these proceedings.

(Signed) A. B.

Form of Verification : See No. 1

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 8, the words and the bracket "(High)", (Hon'ble)" and "(or to the Judge of)" and the words "To the Hon'ble Mr. Justice" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 9—*Statement in answer to No. 8*

In the (High) Court of

The day of

Between A. B., petitioner, and

C. B., respondent.

C. B., the respondent, in answer to the petition filed in this cause by W. J. his attorney (or Vakil) saith that he denies that he has been guilty of cruelty towards the said A. B., as alleged in the said petition.

(Signed) C. B.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 9, the word and the brackets "(High)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 10—*Petition for reversal of decree of separation*

(*See* Section 24)

In the (High) Court of

To the Hon'ble Mr. Justice.....(or to the Judge of.....)

The.....day of.....186 .

The petition.....A.B., of.....,

SHEWETH,

1. That your petitioner was on the.....day of.....lawfully married to.....

2. That on the.....day of.....this (Hon'ble) Court at the petition of....., pronounced a decree affecting the petitioner to the effect following, to wit,—

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(Here set out the decree)

3. That such decree was obtained in the absence of your petitioner, who was then residing at.....

(State facts tending to show that the petitioner did not know of the proceedings ; and, further, that had he known he might have offered a sufficient defence).

or

That there was reasonable ground for your petitioner leaving his said wife, for that his said wife

(Here state any legal grounds justifying the petitioner's separation from his wife).

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) A.B.

Form of Verification : *See* No. 1.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 10, the words and the brackets "(High)", "(or to the Judge of)" and "(Hon'ble) and the words "To the Hon'ble Mr. Justice" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 11—*Petition for Protection-order.*

(*See* Section 27)

In the (High) Court of

To the Hon'ble Mr. Justice.....(or to the Judge of.....)

The.....day of.....186 .

The petition of C.B. of the wife of A.B.

SHEWETH,

That on the.....day of.....she was lawfully married to A. B. at

That she lived and cohabited with the said A. B. for.....years at ....., and also at.....and hath had.....children, issue of her said marriage, of whom.....are now living with the applicant, and wholly dependent upon her earnings.

That on or about....., the said A.B., without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her.

That since the desertion of her said husband, the applicant hath maintained herself by her own industry (or on her own property, as the case may be), and hath thereby and otherwise acquired certain property consisting of (here state generally the nature of the property.

Wherefore she prays an order for the protection of her earnings and property acquired since the said,

day of

and from all creditors and persons claiming under him from the said A. B.

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(Signed) C. B.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 11, the words and the brackets "(High)" and "(or to the Judge of)" and the words "To the Hon'ble Mr. Justice" shall be omitted— U. P. Act XXX of 1957, Section 2 and Sch.

No. 12—*Petition for alimony pending the suit*

(*See* Section 36)

In the (High) Court of

B. against B.

To the Hon'ble Mr. Justice.....(or To the Judge of.....).

The .....day of.....186.

The petition of C. B., the lawful wife of A. B.

SHEWETH,

1. That the said A. B. has for some years carried on the business of....., at....., and from such business derives the nett annual income of from Rs. 4,000 to 5,000.

2. That the said A. B. is possessed of plate, furniture, linen and other effects at his said house,.....aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said A. B. is entitled, under the will of his father, subject to the life interest of his mother therein to property of the value of Rs 5,000 or some other considerable amount. (a)

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet.

(Signed) C. B.

Form of Verification : *See No.* 1.

STATE AMENDMENT

UTTAR PRADESH. In Form No. 12, the words and the brackets "(High)", "(or to the Judge of)" and "(Hon'ble)" and the words "To the Hon'ble Mr. Justice" shall be omitted.—U. P. Act XXX of 1957, Section 2 and Sch.

No. 13—*Statement in answer to* No. 12.

In the (High) Court of

B against B

A. B. of.....,the above-named respondent in answer..... to the petition for alimony, pending the suit, of C. B., says—

(a) The petitioner should state her husbands 'income as accurately as possible.

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1. In answer to the first paragraph of the said petition, I say that I have for the last three years carried, on the business of....., at.....and that, from such business, I have derived a nett annual income of Rs. 900, but less than Rs. 1,000.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels and effects at my said house .....aforesaid, of the value of Rs. 7,000 but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own monies. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall, have to pay to my father's executors the sum of Rs. 2,000 the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And, in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me, which she did on the.....day of..... last, has been considerably diminished, and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annul sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition, I say that, when my wife left, my dwelling-house on the day of last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value of, as I verily believe, Rs. 800 at the least; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills due to me from certain lodgers of mine, amounting in the aggregate to Rs. , and that she has ever since withheld and still withholds from me the same sum.

(Signed) A.B.

STATE AMENDMENT

UTTAR PRADESH. In Form No. 13, the word and brackets "(High)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

No. 14 - *Undertaking by minor's next friend to be answerable for respondent's costs.*

(*See* Section 49)

In the (High Court of

I, the undersigned A.B, of being the next friend of C.D. who is a minor, and who is desirous of filing a petition in this Court, under the

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Indian Divorce Act, against D.D. of , hereby undertake to be responsible for the costs of the said D.D. in such suit. and that, if the said C.D. fail to pay to the said D.D when and in such manner as the Court shall order all such costs of such suit as the Court shall direct him (or her) to pay to the said D.D., I will forthwith pay the same to the proper officer of this Court.

Dated this day of 186 .

(Signed) A.B.

STATE AMENDMENT

UTTAR PRADESH.—In Form No. 14, the word and brackets "(High)" shall be omitted—U. P. Act XXX of 1957, Section 2 and Schedule.

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APPENDIX XIII

THE CONVERTS' MARRIAGE DISSOLUTION ACT, 1866

(Act No. 21 of 1866)[1]

[2nd April, 1866]

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Sections

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5. When convert deserted by her husband may sue.
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8. On service of petition, citation to respondent.
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1. The Act has not been extended to the State of Manipur, vide Act 30 of 1950, Section 3 (2) and Schedule.

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Proviso.

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FIRST SCHEDULE—Form of petition.

SECOND SCHEDULE—Form of citation in ordinary cases.

THIRD SCHEDULE—Form of citation in case of respondent exempt from appearance in Court.

An Act to legalize, under certain circumstances, the dissolution of marriages of [1]* * * Converts to Christianity

Preamble.—Whereas it is expedient to legalize, under certain circumstances, the dissolution of marriages of [1]* * * Converts to Christianity deserted or repudiated on religious grounds by their wives or husband; It is enacted as follows:

1. **Short title.**—This Act may be cited as the [1]* * * Converts' Marriage Dissolution Act, 1866.

2. **Commencement of Act.**—Rep. by the Repealing Act, 1874 (16 of 1874), Section 1 and Schedule I.

STATE AMENDMENT

PONDICHERRY.—After Section 1 insert the following.

2. Nothing contained in this Act shall apply to Saving the Renoncants of the Union territory of Pondicherry—Act 26 of 1968.

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1. The word "Native" omitted by the A.O. 1950.

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3. **Interpretation-clause.**—In this Act—

"*Husband*".—"[1][* * *] husband" shall mean a married man domiciled in [2](India), who shall have completed the age of sixteen years, and shall not be a Christian, a Muhamadan nor a Jew;

"*Wife*".—[1]"[* * *] wife" shall mean a married woman domiciled in [2][India] who shall have completed the age of thirteen years, and shall not be a Christian, a Muhammadan nor a Jewess;

"*Personal law*".—[3]"[Personal law]" shall mean any law, or custom having the force of law, of any persons domiciled in [2][India] other than Christians, Muhammadans and Jews;

"*Month*" *and* "*Year*".—"Month" and "year" shall respectively mean month and year according to the British calendar;

[4]* * * *

4. **When convert deserted by his wife may sue for conjugal society.**—If a [1][* * *] husband change his religion for Christianity, and if in consequence of such change his [1](* * *) wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

5. **When convert deserted by her husband may sue.**—If a [1][* * *] wife change her religion for Christianity, and if in consequence of such change her [1][* * *] husband, for the space of six continuous months, desert or repudiate her, she may sue him for conjugal society.

6. **Court in which suit shall be brought.**—If the respondent, at the time of commencement of such suit, reside within the local limits of the ordinary original civil jurisdiction of any of the High Courts of Judicature, the suit shall be commenced in such Court; otherwise it shall be commenced in the principal Civil Court of original jurisdiction of the district in which the defendant shall reside at the commencement of the suit.

7. **Suit to be commenced by verified petition.**—The suit shall be commenced by a petition in the form in the First Schedule to this Act, or as near thereto as the circumstances of the case will allow.

The statements made in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints; and the petition [5][* * *] may be amended by permission of the Court.

8. **On service of petition, citation to respondent.**—A copy of the petition shall be served upon the respondent, and the Court shall thereupon issue a citation under the seal of the Court and signed by the Judge.

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1. The word "Native" omitted by the A. O. 1950.

2. Subs. by the A. O. 1950, for "the Provinces" which had been subs. by the A. O. 1948, for "British India".

3. Subs. by the A. O. 1950 for "Native law".

4. The paragraph relating to "Number" rep. by Act 10 of 1914, Section 3 and Schedule II, and the definition of "High Court" rep. by the A. O. 1937.

5. The words 'shall bear a stamp of two rupees, and rep." by Act 7 of 1870, Section 2, Schedule III, Pt. II.

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9. Form of citation.- In ordinary cases the citation shall be in the form in the Second Schedule to this Act, or as near thereto as the circumstances of the case will allow.

But where the respondent is exempt by law from personal appearance in Court, or where the Judge shall so direct, the citation shall be in the form in the Third Schedule to this Act, or as near thereto as the circumstances of the case will allow.

10. Service of citation.— A copy of the citation sealed with the seal of the Court shall be served on the respondent; and the provisions of the Code of Civil Procedure as to the service and endorsement of summonses shall apply, *mutatis mutandis*, to citations under this Act (5 of 1908).

11. Penalty on respondent not obeying citation.—If the respondent shall not obey such citation, and comply with every other requirement made upon her or him under the provisions of this Act, she or he shall be liable to punishment under Section 174 of the Indian Penal Code (45 of 1860).

12. Points to be proved on appearance of petitioner. – On the day fixed in the citation the petitioner shall appear in Court, and the following points shall be proved;

(1) the identity of the parties;

(2) the marriage between the petitioner and the respondent;

(3) that the male party to he suit has completed the age of sixteen years, and that the female party to the suit hasc ompleted the age of thirteen years;

(4) the desertion or repudiation of the petitioner by the respondent;

(5) that such desertion or repudiation was in consequence of the petitioner's change of religion;

(6) and that such desertion or repudiation had continued for the six months immediately before the commencement of the suit.

13. First interrogation of respondent.—The respondent, if such points be proved to the satisfaction of the Judge, shall thereupon be asked whether she or he refuses to cohabit with the petitioner, and, if so, what is the ground of such refusal.

In ordinary cases such interrogation and every other interrogation prescribed by this Act shall be made by the Judge, but when the respondent is exempt by law from personal appearance in Court, or when the Judge shall, in his discretion, excuse the respondent from such appearance, the interrogations shall be made by Commissioners acting under such commission as hereinafter mentioned.

14. Interrogations by Judge may be public or private.— Every interrogation mentioned in this Act and made by the Judge may, at the discretion of the Judge, take place in open Court or in his private room.

If any such interrogation take place in open Court, the Judge may, so long as it shall continue, exclude from the Court all such persons as he shall think fit to exclude.

15. Procedure when female respondent refuses to cohabit with petitioner: Adjournment for a year: Interview.—If the respondent be a female, and in answer to the interrogatories of the Judge or Commissioners, as the

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case may be, shall refuse to cohabit with the petitioner the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall make an order adjourning the case for a year, and directing that, in the interim, the parties shall, at such place and time as he shall deem convenient, have an interview of such length as the Judge shall direct, and in the presence of such person or persons (who may be a female or females) as the Judge shall select, with the view of ascertaining whether or not the respondent freely and voluntarily persists in such refusal.

16. Procedure on expiration of adjournment : Interrogation of respondent ; Decree. At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to ; and if the points mentioned in Section 12 and this section of this Act shall be proved to the satisfaction of the Judge, and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner,

and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved.

17. Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion.– If the respondent be a male, and in answer to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall adjourn the case for a year.

At the expiration of such adjournment, the petitioner shall again appear in Court ; and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the Judge shall thereupon pass such a decree as last aforesaid :

Proviso.—Provided that if the petitioner shall so desire (but not otherwise), the proceedings in the suit shall, *mutatis mutandis*, be the same as in the case of a female respondent.

18. Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at the time of marriage.—Notwithstanding anything hereinbefore contained, if it shall appear at any stage of the suit that both or either of the parties had not attained puberty at the date of their marriage, and that such marriage has not been consummated ; and if in answer to the interrogatories made pursuant to Section 13 of this Act, the respondent shall refuse to cohabit with the petitioner, and allege, as the ground for such refusal, that the petitioner has changed his or her religion, the Judge shall thereupon pass such a decree as last aforesaid.

19. Liberty to parties to marry again.—When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be as lawful for the respective parties thereto to marry again as if the prior marriage had been dissolved by death, and the issue of any such re-marriage shall be legitimate, any [1][personal law] to the contrary notwithstanding :

Proviso.—Provided always that no Minister of Religion shall be compelled to solemnize the marriage of any person whose former marriage

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1. Subs. by the A. O. 1950, for "Native law".

may have been dissolved under this Act, or shall be liable to any suit or penalty for refusing to solemnize the marriage of any such person.

20. Judge to order commission to issue for examination of exempted persons.—In suits instituted under this Act, the Judge shall order a commission to issue to such persons, whether males or females or both, as he shall think fit, for the examination on interrogatories or otherwise of any persons so exempt as aforesaid.

The provisions of the Code of Civil Procedure (5 of 1908) shall, so far as practicable, apply to commissions issued under this section.

21. Proof of marriage and desertion or repudiation of petitioner in consequence of conversion.—At any stage of a suit instituted under this Act, cohabitation as man and wife shall be sufficient presumptive evidence of the marriage of the parties, and proof of the respondent's refusal or voluntary neglect to cohabit with the petitioner, after his or her change of religion and after knowledge thereof by the respondent, shall be sufficient evidence of the respondent's desertion or repudiation of the petitioner, and shall also be sufficient evidence that such desertion or repudiation was in consequence of the petitioner's change of religion, unless some other sufficient cause for such desertion or repudiation be proved by the respondent.

22. Civil Procedure Code applied.—The provisions of the Code of Civil Procedure (5 of 1908) as to the summoning and examination of witnesses shall apply in suits instituted under this Act.

23. Dismissal of suit if either party under age required by Act, or if parties cohabiting, or respondent willing to cohabit.—If at any stage of the suit it be proved that the male party to the suit is or was at the institution thereof under the age of sixteen years, or that the female party to the suit is or was at the same time under the age of thirteen years, or that the petitioner and the respondent are cohabiting as man and wife, or if the Court is satisfied by the evidence adduced that the respondent is ready and willing so to cohabit with the petitioner, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

24. Revival of suit after such dismissal.—If at any time within twelve months after a decree dismissing the suit upon any of the grounds mentioned in the last preceding section, the respondent again desert or repudiate the petitioner upon the ground of his or her change of religion, the suit may be revived by summoning she respondent; and upon proof of the former decree and of such renewed repudiation or desertion, the suit shall recommence at the stage at which it had arrived immediately before the passing of such decree; and, after the proofs, interrogations, interview and adjournment which may then be requisite under the provisions hereinbefore contained, the Judge shall pass a decree of the nature mentioned in Section 16 of this Act.

25. Petitioner's cruelty or adultery to bar suit.—If at any stage of the suit it be proved that the respondent has deserted or repudiated the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

A suit dismissed under this section shall not be revived.

26. Male petitioner's cohabitation with one of several wives to bar suit.—If the petitioner, being a male, has at the time of the institution of the suit two or more wives, he shall make them all respondents; and if at any

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stage of the suit it be proved that he is cohabiting with one of such wives as man and wife, or that any one of such wives is ready and willing so to cohabit with him, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

The provisions as to revival contained in Section 24 of this Act shall apply, *mutatis mutandis*, to a suit dismissed under this section.

27. Dissolution of marriage not to affect status or right of children.— A dissolution of marriage under the provisions of this Act shall not operate to deprive the respondent's children (if any) by the petitioner of their status as legitimate children, or of any right or interest which they would have had, according to the [1][personal law] applicable to them, by way of maintenance, inheritance, or otherwise, in case the marriage had not been so dissolved as aforesaid.

28. Power to Court to award alimony.— If a suit be commenced under the provisions of this Act, and it appear to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the Court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit, and also for her maintenance pending the suit.

If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think just, and having regard to the condition and station in life of the parties.

And allowance to ordered shall cease from the time of any subsequent marriage of the wife.

29. No appeal under Act; but Judge may state case raising question whether conversion has dissolved marriage.—No appeal shall lie against any order or decree made or passed by any Court in any suit instituted under this Act; but if, at any stage of the suit, the respondent shall allege by way of defence that the marriage between the parties has been dissolved by the conversion of the petitioner, and that consequently the petitioner is not a [2][* * *] husband or a [2][* * * *] wife (as the case may be) within the meaning of this Act, the Judge, if he shall entertain any doubt as to the validity of such defence, shall, either of his own motion or on the application of the respondent, state the case and submit it with his own opinion thereon for the decision of the High Court.

30. Case to state necessary facts and documents, and suit to be stayed.— Every such case shall concisely set forth such facts and documents as may be necessary to enable the High Court to decide the questions raised thereby, and the suit shall be stayed until the judgment of such Court shall have been received as hereinafter provided.

31. Case to be decided by three Judges.—Every such case shall be decided by at least three Judges of the High Court, if such Court be the High Court at any of the presidency-towns; and the petitioner and respondent may appear and be heard in the High Court in person or by advocate or vakil.

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1. Subs. by the A. O. 1950 for "Native law".
2. The word "Native" omitted by the A. O. 1950.

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32. High Court may refer case to Judge for additions or alterations.—If the High Court shall not be satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the High Court may refer the case back to the Judge by whom it was stated, to make such additions thereto or alterations therein as the High Court may direct in that behalf.

33. High Court may decide question raised, and Judge shall dispose of case accordingly.—It shall be lawful for the High Court, upon the hearing of any such case, to decide the questions raised thereby, and to deliver its judgment thereon containing the grounds on which such decision is founded ;

and it shall send to the Judge by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Judge shall, on receiving the same, dispose of the case conformably to such judgment.

34. Saving of Roman Catholic marriages.—Nothing contained in this Act [1][* * *] shall be taken to render invalid any marriage of a [2][* * *] convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church [3][* * *].

[4][**35. Extent of Act.**—This Act extends to [5][the whole of India [6][except the State of Jammu and Kashmir and the Union Territory of Manipur]].]

THE FIRST SCHEDULE

(*See* Section 7)

FORM OF PETITION

Stamp [7][* *]

To the Judge of the Civil Court of

The day of 18 .

The petition of A. B. of

SHEWETH :

1. That your petitioner was born on or about the day of 18 .

---

1. The words and figures "or in Act Nos. XXV of 1864 and V of 1865" rep. by Act 16 of 1874, Section 1 and Sch.
2. The word "Native" omitted by the A. O. 1950.
3. The words "and no Clergyman of such Church shall be liable to any suit or penalty under the provisions of either of the two Acts last hereinbefore mentioned, for solemnizing any such marriage" rep. by Act 16 of 1874, Section 1 and Sch.
4. Subs. by the A. O. 1948, for the former Section 35.
5. Subs. by the A. O. 1950, for "all the Provinces of India".
6. Subs. by Act 48 of 1959, Section 3 and Sch. I, for certain words (w. e. f. 1-2-1960).
7. The words "Rs two" printed below the word "Stamp" rep. by Act 12 of 1891, Section 2 and Sch. I.

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2. That your petitioner was on the day of in the year 18 lawfully married to C. D. at

3. That the said C. D. is now of the age of years or thereabouts.

4. That after his said marriage, your petitioner lived and cohabited with his said wife at aforesaid until the day of 18 .

5. That previous to the day of 18 your petitioner changed his religion for Christianity, and that on such day he was baptised and became a member of the Church of

6. That on the day of 18 . (at least six months prior to the date of the petition), the said C. D. deserted your petitioner, and has not since resumed cohabitation with him.

7. That such desertion was in consequence of your petitioner's said change of religion.

8. That there is no collusion nor connivance between your petitioner and the said C. D.

Your petitioners therefore prays that your Honour will order the said C. D. to live and cohabit with your petitioner, or declare that your petitioner's marriage is dissolved.

A. B.

Form of Verification

I, A. B., the petitioners named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

THE SECOND SCHEDULE

(*See* Section 9)

FORM OF CITATION IN ORDINARY CASES

To C. D. of

Whereas A. B. of , claiming to have been lawfully married to you, the said C. D., has filed his (or her) petition against you in the Civil Court of alleging that you, the said C. D., have deserted him (or her) for six months in consequence of his (or her) having changed his (or her) religion for Christianity and praying that, unless you consent to live and cohabit with him (or her), it may be declared that his (or her) marriage is dissolved : Now this is to command you that, at the expiration of days (at least one month) from the date of the service of this on you, you do appear in the said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that in default of your so appearing, you will be liable to punishment under Section 174 of the Indian Penal Code (45 of 1860).

Dated the day of 18 .

(Signed) E. F.,

Judge of the Civil Court of .

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(Indorsement to be made after service)

This citation was duly served by G. H. on the within-named C. D. of at on the day of 18 .

(Signed) G. H.

THE THIRD SCHEDULE

(*See* Section 9).

FORM OF CITATION IN CASE OF RESPONDENT EXEMPT FROM APPEARANCE IN COURT

To C. D. of

Whereas A. B. of , claiming to have been lawfully married to you, the said C. D., has filed his (or her) petition against you in the Civil Court of , alleging that you, the said C. D., have deserted him (or her) for six months in consequence of his (or her) having changed his (or her) religion for Christianity, and praying that, unless you consent to cohabit with him (or her), it may be declared that his (or her) marriage is dissolved :

Now this is to command you that, at the expiration of days (at least one month) from the service of this on you, you do hold yourself in readiness to answer and do answer such interrogatories as may be put to you by Commissioners duly authorised in that behalf under a commission issued by this Court, in reference to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that, in default of your so holding yourself in readiness and answering such interrogatories, you will be liable to punishment under Section 174 of the Indian Penal Code (45 of 1860).

Dated the day of 18 .

(Signed) E, F.,

Judge of the Civil Court of,

(Indorsement to be made after service)

This citation was duly served by G. H. on the within-named C. D. of a on the day of 18 ,

(Signed) G. H.

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APPENDIX XIV

THE INDIAN MATRIMONIAL CAUSES (WAR MARRIAGES) ACT, 1948

(Act No. 40 of 1948)

[3rd September, 1948]

CONTENTS

Sections

1. Short title and extent.
2. Definitions.
3. Application of Act.
4. Temporary extension of jurisdiction of High Courts.
5. Saving.
6. Certain decrees and orders to be recognised.
7. Power to make rules.

An Act to confer upon Courts temporary jurisdiction in certain matrimonial causes

Whereas it is expedient to confer upon Courts [1][* * *] temporary jurisdiction in certain matrimonial causes ;

It is hereby enacted as follows :—

1. Short title and extent.—(1) This Act may be called the Indian Matrimonial Causes (War Marriages) Act, 1948.

(2) It extends to the whole of India, except [2][the territories which immediately before the Ist November, 1956, were comprised in Part B States].

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) "High Court" shall have the same meaning as in the Indian Divorce Act, 1869 (4 of 1869) ;

(b) "marriage" includes a purported marriage which was void *ab initio* and "husband" and "wife" shall be construed accordingly ;

(c) "war period" means the period commencing on the 3rd day of September, 1939, and ending on the 31st day of March, 1946.

3. Application of Act.—The marriages to which this Act applies are marriages solemnized during the war period, where the husband was, at the time of the marriage, domiciled outside India, and the wife was, immediately before the marriage, domiciled in India :

Provided that this Act shall not apply to any marriage if, since the solemnization thereof, the parties thereto have resided together in the country in which the husband was domiciled at the time of residence.

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1. The words "in the Provinces of India" omitted by the A. O. 1950.
2. Subs. by the Adaptation of Laws (No. 3) Order, 1956, for "Part B States".

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Explanation.—For the purposes of the above proviso the whole of the United States of America, the whole of the United Kingdom and the whole of any British possession [1][* * *] shall each be treated as one country.

4. **Temporary extension of jurisdiction of High Courts.**—In the case of any marriage to which this Act applies, the High Court shall have jurisdiction in and in relation to any proceedings for divorce or for nullity of marriage as if both parties were at all material times domiciled in India; and subject to the provisions of this Act, the provisions of the Indian Divorce Act, 1869 (4 of 1869), shall apply, so far as may be, in relation to any such proceedings instituted under this Act as if they were proceedings instituted under that Act:

Provided that this section shall not apply in relation to any proceedings for divorce or for nallity of marriage unless—

(a) the petitioner or the respondent professes the Christian religion, and

(b) the proceedings for divorce or for nullity of marriage are commenced not later than three years from the commencement of this Act.

5. **Saving.**—Nothing in this Act shall be deemed to extend or alter the jurisdiction of the High Court in, or in relation to, any proceedings for divorce or for nullity of marriage, where at the commencement of those proceedings the parties are domiciled anywhere in India.

6. **Certain decrees and orders to be recognised.**—The validity of any decree or order made in the United Kingdom by virtue of the Matrimonial Causes (War Marriages) Act, 1944 shall, by virtue of this Act, be recognised in all Courts in the States of India.

7. **Power to make rules.**—The High Court may make such rules as may be necessary for the purpose of carrying out the objects of this Act.

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1. The words "outside India" omitted by the A. O. 1950.

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APPENDIX XV

THE HINDU WIDOWS' RE-MARRIAGE ACT, 1856[1]

(Act No. 15 of 1956)

[25th July, 1856]

CONTENTS

Sections

1. Marriage of Hindu widows legalized.
2. Rights of widow in deceased husband's property to cease on her re-marriage.
3. Guardianship of children of deceased husband on the re-marriage of his widow.
4. Nothing in this Act to render any childless widow capable of inheriting.
5. Saving of rights of widow marrying, except as provided in Section 2 to 4.
6. Ceremonies constituting valid marriage to have same effect on widow's marriage.
7. Consent to re-marriage of minor widow.
   Punishment for abetting marriage made contrary to this section.
   Effect of such marriage. Proviso.
   Consent to re-marriage of major widow.

An Act to remove all legal obstacles to the marriage of Hindu widows

Preamble—Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property;

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1. Short title given by the Indian Short Titles Act, 1897 (14 of 1897).

This Act has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941) and has been declared to be in force in—

all the Provinces of India, except the Scheduled Districts, by the Laws Local Extent Act, 1874 (14 of 1874), Section 3;

the Sonthal Parganas, by the Sonthal Parganas Settlement Regulation (3 of 1872), Section 3;

the Khondmals District by the Khondmals Laws Regulation, 1936 (4 of 1936), Section 3 and Schedule; and

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(*Contd. on p.* 487)

And whereas many Hindus believe that this imputed legal incapacity although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent

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(*From p.* 486)

the Angul District by the Angul Laws Regulation, 1936 (5 of 1936), Section 3.

It has also been extended to the New Provinces and Merged States, see Act 59 of 1949.

It has been declared, by notification under Section 3 (a) of the Scheduled Districts, Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts, namely :

West Jalpaiguri	*See* Gazettee of India, 1881, Pt. I, p. 74.	
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum	Ditto	1881, Pt. I, p. 504
Kumaon and Garhwal	Ditto	1876, Pt. I, p. 605
The Scheduled protion of the Mirzapur District	Ditto	1879, Pt. I, p. 383
Jaunsar Bawar	Ditto	1879, Pt. I, p. 382
The District of Lahaul	Ditto	1868, Pt. I, p. 301
The Scheduled Districts of the C. P.	Ditto	1879, Pt. I, p. 771
The Scheduled Districts in Ganjam and Visakhapatnam	Ditto	1898, Pt. I, p. 870
Coorg	Ditto	1878, Pt. I, p. 747
The Dists. of Kamrup, Naugong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Dvars) and Cachar (excluding the North Cachar Hills)	Ditto	1878, Pt. I, p. 533
The Garo Hills, the Khasi and Jaintia Hills, the Naga Hills, the North Cachar Hills, the Cachar District and the Eastern Dvars in the Goalpara District	Ditto	1897, Pt. I, p. 299
The Porahat Estate in the Singhbhum District	Ditto	1897, Pt. I, p. 1059

It has been extended, by notification under Section 5 of the last-mentioned Act, to the following Scheduled Districts, namely :

The Tarai District of the Province of Agra	*See* Gazette of India, 1876, Pt. I, p. 505.	
The Andaman and Nicobar Islands...	Ditto	1882, Pt. I, p. 148.

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those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences ;

And whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare ; It is enacted as follows : –

1. **Marriage of Hindu widows legalized.**—No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

2. **Rights of widow in deceased husband's property to cease on her re-marriage.**—All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

3. **Guardianship of children of deceased husband on the re-marriage of his widow.**—On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother ; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother :

Provided that, when the said children have no property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

4. **Nothing in this Act to render any childless widow capable of inheriting.**—Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

5. **Saving of rights of widow marrying, except as provided in Sections 2 to 4.**—Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled ; and every widow who has re-married shall

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have the same rights of inheritance as she would have had, had such marriage been her first marriage.

6. Ceremonies constituting valid marriage to have same effect on widow's marriage.—Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

7. Consent to re-marriage of minor widow.—If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section.—All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriage : Proviso.—And all marriages made contrary to the provisions of this section may be declared void by a Court of law : Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow.—In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

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APPENDIX XVI

THE ANAND MARRIAGE ACT, 1909

(Act No. 7 of 1909)

[22nd October, 1909]

CONTENTS

Sections

1. Short title and extent.
2. Validity of Anand marriages.
3. Exemption of certain marriages from Act.
4. Saving of marriages solemnized according to other ceremonies.
5. Non-validation of marriages within prohibited degrees.

An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand

Whereas it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand ;

It is hereby enacted as follows :—

1. Short title and extent.—(1) This Act may be called the Anand Marriage Act, 1909 ; and

(2) It extends to the whole of India [1][except the State of Jammu and Kashmir].

2. Validity of Anand marriages.—All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been with effect from the date of the solemnization of each respectively, good and valid in law.

3. Exemption of certain marriages from Act. - Nothing in this Act shall apply to—

(a) any marriage between persons not professing the Sikh religion, or

(b) any marriage which has been judicially declared to be null and void.

4. Saving of marriages solemnized according to other ceremonies.—Nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.

5. Non-validation of marriages within prohibited degrees.—Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal.

———

1. Subs. by Act 48 of 1959, Section 3 and Schedule I, for Certain words (w. e. f. 1-2-1960).

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APPENDIX XVII

THE ARYA MARRIAGE VALIDATION ACT, 1937

(Act No. 19 of 1937)

[14th April, 1937]

CONTENTS

Sections

1. Short title and extent.

2. Marriage between Arya Samajists not to be invalid.

An Act to recognise and remove doubts as to the validity of inter-marriages current among Arya Samajists

Whereas it is expedient to recognise and place beyond doubt the validity of inter-marriages of a class of Hindus known as Arya Samajists;

It is hereby enacted as follows:—

1. Short title and extent.—(1) This Act may be called the Arya Marriage Validation Act, 1937.

[1][(2) It extends to the whole of India except [2][the territories which, immediately before the 1st November, 1956, were comprised in Part B States] and applies also to citizens of India wherever they may be].

2. Marriage between Arya Samajists not to be invalid.—Notwithstanding any provision of Hindu Law, usage for custom to the contrary no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed over to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus or that either or both of the parties at any time before the marriage belonged to a religion other than Hinduism.

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1. Subs. by the A. O. 1950, for the former sub-section (2).
2. Subs. by the Adaptation of Laws (No. 3) Order, 1956, for "Part" B States".

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APPENDIX XVIII

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

(Act No. 8 of 1939)

[17th March, 1939]

CONTENTS

Sections

1. Short title and extent.
2. Grounds for decree for dissolution of marriage.
3. Notice to be served on heirs of the husband, when the husband's whereabouts are known.
4. Effect of conversion to another faith.
5. Rights to dower not to be affected.
6. [Repealed].

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam ay a married Muslim woman on her marriage tie

Where as it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie ;

It is hereby enacted as follows :

1. Short title and extent.—(1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to the whole of India [1][except the State of Jammu and Kashmir].

STATE AMENDMENT

PONDICHERRY.—In Section 1, after sub-section (2), add :

"Provided that nothing contained in this Act shall apply to Renoncants of the Union territory of Pondicherry"—Act 26 of 1968, Section 3 (1) and Schedule.

2. Grounds for decree for dissolution of marriage.—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely :

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1. Subs. by Act 48 of 1959, Section 3 and Schedule I, for certain words (w.e.f. 1-2-1960).

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(i) that the whereabouts of the husband have not been known for a period of four years ;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years ;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards ;

(iv) that the husband has failed to perform, without reasonable cause, his martial obligations for a period of three yers ;

(v) that the husband was impotent at the time of the marriage and continues to be so ;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease ;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years :

Provided that the marriage has not been consumated ;

(viii) that the husband treats her with cruelty, that is to say,—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran ;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law :

Provided that—

(a) no decree shall be passed on ground (iii) until the sentence has become final ;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree ; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

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3. Notice to be served on heirs of the husband, when the husband's whereabouts are not known.—In a suit to which clause (i) of Section 2 applies—

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit :

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. Effect of conversion to another faith.—The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage :

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2 :

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. Rights to dower not to be affected.—Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

6. Repeal of Section 5 of Act 26 of 1937.—Rep. by the Repealing and Amending Act, 1942 (25 of 1942), Section 2 and Sch. I.

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APPENDIX XIX

THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937

(Act No. 26 of 1937)

[7th October, 1937]

CONTENTS

Sections

1. Short title and extent.
2. Application of Personal Law to Muslims.
3. Power to make a declaration.
4. Rule-making power.
5. [Repealed].
6. Repeals.

An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims [1]* * *

Whereas it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslims [1][* * *]; It is hereby enacted as follows :

1. Short title and extent.—(1) This Act may be called the Muslim Personal Law (Shariat) Application Act, 1937.

(2) It extends to the whole of India [2][except the State of Jammu and Kashmir] [3] * * *

STATE AMENDMENT

PONDICHERRY.—In Section 1 after sub-section (2) insert the following proviso, namely :

"Provided that nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry"—Act XXXVI of 1968, Section 3 and Sch.

2. Application of Personal Law to Muslims.—Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, includ-

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1. The words "in the Provinces of India" omitted by the A.O. 1950.
2. Subs. by Act 48 of 1959, Section 3 and Sch. I, for certain words (w.e.f. 1-2-1960).
3. The words "excluding the North-West Frontier Province" omitted by the A. O. 1948.

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ing talaq, ila, zihar, lian, khula and mubarat, maintenance, dower, guardianship, gifts trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

STATE AMENDMENTS

ANDHRA PRADESH.— Same as that of Tamil Nadu.

KERALA.—Same as that of Tamil Nadu except that in Kerala, between the words "trust properties and wakfs" and "the rule of decision in cases", and the words, brackets etc. "(other than charities and charitable institutions and charitable and religious endowments)".—Ker Act 42 of 1963, Section 3 (12-11-1963).

TAMIL NADU.—For Section 2 substitute the following section, namely :

"2. *Application of Personal Law to Muslims.*— Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubarat, maintenance, dower, guardianship, gifts, trusts, and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)"—T. N. Act XVIII of 1949, Section 2 (12-7-1949) : T. N. Act XXIII of 1960, Section 3 (1-2-1961).

3. Power to make a declaration.—(1) Any person who satisfies the prescribed authority—

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of Section 11 of the Indian Contract Act, 1872 (9 of 1872), and

(c) that he is a resident of [1][the territories to which this Act extends],

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [2][the provisions of this section], and thereafter the provisions of Section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the State Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

4. Rule-making power.—(1) The State Government may make rules to carry into effect the purposes of this Act.

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1. Subs. by the Adaptation of Laws (No. 3) Order, 1956, for "a Part A State or a Part C State".

2. Subs. by Act 16 of 1943, Section 2, for "this Act".

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(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely—

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made ;

(b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act ; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

5. Dissolution of marriage by Court in certain circumstances.—Rep. by the Dissolution of Muslim Marriages Act, 1939 (8 of 1939), Section 6].

6. Repeals.—[1][The undermentioned provisions) of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely—

(1) Section 26 of the Bombay Regulation IV of 1827 ;

(2) Section 16 of the Madras Civil Courts Act, 1873 (3 of 1873) ;

[2]* * * * *

(4) Section 3 of the Oudh Laws Act, 1876 (18 of 1876) ;

(5) Section 5 of the Punjab Laws Act, 1872 (5 of 1872) ;

(6) Section 5 of the Central Provinces Laws Act, 1875 (20 of 1875) ; and

(7) Section 4 of the Ajmere Laws Regulation, 1877 (Reg. 3 of 1877).

———

1. Subs. by Section 3, ibid, for "Provisions".

2. The words, figures and brackets "(3) Section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887" omitted by Section 3, ibid.

This omission has the effect of reviving the operation of Section 37 of that Act.

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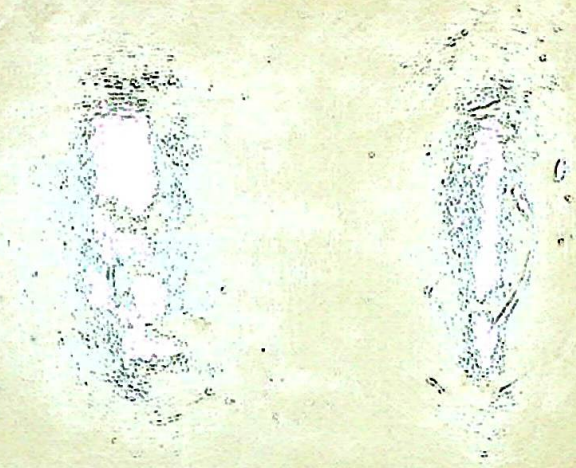
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